Study L-3032 January 31, 2006

Memorandum 2006-5

Beneficiary Deeds (Discussion of Issues)

This memorandum continues the Law Revision Commission's study of beneficiary deeds. The memorandum presents an overview of existing devices available in California for transfer of real property at death, reviews experience in other jurisdictions that have enacted beneficiary deed (or transfer on death deed) legislation, and begins the analysis of issues relating to the beneficiary deed. The analysis of issues in this memorandum covers operational issues — execution, recordation, effect of other instruments, effectuation of transfer, contests, and the like. A future memorandum will address issues relating to rights of the owner, rights of beneficiaries, rights of family members, rights of creditors, rights of third party transferees, tax considerations, Medi-Cal considerations, and statutory forms.

Attached to this memorandum as an Exhibit are the following communications.

BACKGROUND

AB 12 (DeVore), enacted as 2005 Cal. Stat. ch. 422, directs the Law Revision Commission to conduct a study to determine whether legislation establishing a beneficiary deed should be enacted in California. If the Commission concludes that legislation to establish a beneficiary deed should be enacted, the Commission should also recommend the content of the proposed statute. The Commission's report on this matter is due to the Legislature on or before January 1, 2007.

The Commission has decided on following process for this study. We will:

(1) Evaluate existing devices in California for transferring real property on death, and compare them with the advantages and disadvantages of the beneficiary deed.

(2) Evaluate experience in other jurisdictions that authorize a beneficiary deed.

(3) Address and resolve issues that have been raised concerning the beneficiary deed.

(4) After completing the above steps, make a decision on the merits of the beneficiary deed concept.

COMMENTS OF INTERESTED PERSONS

Recent comments we have received on this study are reproduced in the Exhibit to this memorandum. We will analyze the comments in connection with the issues to which they relate.

In this memorandum we also refer to comments of David Mandel of the Senior Legal Hotline. Mr. Mandel's comments are extracted from a series of email communications that we have not attempted to compile here. Rather, we quote from, or summarize, pertinent portions of the communications as appropriate.

Many of the letters we have received make the general point that a homeowner should be able to deed property directly to heirs without the expense of a trust or a probate proceeding, and they urge the Commission to report favorably on this matter. The authors argue that seniors on a limited income cannot afford legal services, and that enactment of beneficiary deed legislation will not put estate planning and probate attorneys out of business. We will not be in a position to evaluate these comments until after we have completed our review of existing alternatives, experience in other jurisdictions, and issues involving the beneficiary deed.

TERMINOLOGY

Beneficiary Deed

Of the eight jurisdictions that have beneficiary deed legislation, five (Arizona, Arkansas, Colorado, Missouri, Nevada) use the term "beneficiary deed" and three (Kansas, New Mexico, Ohio) use the term "transfer on death deed" (abbreviated as TOD deed).

David Mandel recommends use of the term "transfer on death" instead of "beneficiary" deed. His concern is that "beneficiary" is used in so many different ways — will, trust, insurance policy, public benefit program — that using the term here could be confusing, especially to the relatively unsophisticated public, which is a prime candidate for using this tool. "TOD deed" by contrast is precise. He points out that we authorize a pay on death beneficiary designation on a bank account and call it a "POD account", not a "beneficiary account".

The staff would suspend judgment on this matter until we have had a chance to work with the materials a little. We would use the term "beneficiary deed" for now, just because that's the term used in the legislation that directs this study.

Decedent

In this memorandum we have used the term "decedent" to refer to the property owner seeking to make a donative transfer of real property to a beneficiary at death. This usage necessitates referring to a living person executing an instrument as a "decedent". But we think overall it will be easier to keep the various parties and intermediaries straight if we refer to the person seeking to make an at death transfer as the decedent, particularly in instances of

multiple ownership. An alternative would be to use the term "owner" or "grantor".

EXISTING DEVICES

Overview

What options are available under existing California law for passing real property to a beneficiary at death? Here is a catalog of major devices:

- Lifetime Deed
- Will or Intestate Succession
- Intervivos Trust
- Joint Tenancy
- Community Property
- Intervivos Transfer with Reserved Life Estate
- Revocable Deed
- Conveyance Pursuant to Nonprobate Transfer

Prof. Langbein observes, "If we were concerned to complete a taxonomy of will substitutes, we could lengthen our list to include devices that are scorned by lawyers and financial intermediaries but that still attract laymen. A substantial case law chronicles laymen's quixotic attempts to achieve will-like results by manipulating the contingent estates and delivery rules of the law of deeds. The gift *causa mortis* is a transparent will substitute, but it can be messy to prove, and it is difficult to keep in force because of the rule that it self-destructs on the donor's return to health. These and other stray dogs of the American law of gratuitous transfers populate the law school casebooks but have not been quantitatively important in the nonprobate revolution." Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1115 (1984).

This memorandum is not intended as a treatise on estate planning. We will touch lightly on a few key considerations relating to each alternative, including ownership rights, revocability, cost and ease of transmission, privacy, creditor rights, taxes, and Medi-Cal eligibility and reimbursement. We do not get into the details for each device. Our concern at this point is simply a "big picture" overview.

Ownership Rights

"Ownership rights" refers to the ownership interest retained by the decedent during lifetime. Some transfer devices allow a decedent to retain full ownership rights during lifetime; others transfer incidents of ownership immediately.

Revocability

The "revocability" of the device refers to the owner's ability to make a change to the beneficiary designation, or to revoke the property disposition, so long as the owner retains legal capacity. Some transfer devices are revocable, others are irrevocable.

Cost and Ease of Transmission

The various devices for passing real property to a beneficiary involve widely disparate implementation procedures and costs. Some require judicial action; others involve recordation of an affidavit of death.

Privacy

Some types of transfer at death require public court proceedings. Others are private and free of public scrutiny. In any event, a real property transfer must ultimately be recorded and become a public record in order to be fully effectual.

A decedent may not wish to alert a potential beneficiary to the decedent's estate plan. But a lifetime transfer of real property is not effective unless the deed is delivered and recorded. A disposition of property effective at death may enable the decedent to keep the estate plan confidential until death.

Whether it is a good idea not to notify a beneficiary is another matter. A beneficiary that is aware of the decedent's intentions and actions can take steps to implement the transfer in a timely manner.

There also may be some benefit from the publicity attendant on recordation. For example, fraud, duress, or undue influence may be exposed. The importance of this should not be overstated. Recordation of an instrument does not ordinarily come to the attention of persons who might have an interest in it.

An underlying question is whether the decedent may execute a transfer instrument affecting real property and simply hold it unrecorded until death. Suppose, for example, the decedent executes but does not record a joint tenancy deed. Under general principles of law, a deed may be given effect even though unrecorded. Does the joint tenancy survivorship right prevail over a claim of the decedent's estate? We have come across no direct authority on this point, but we

see no reason why the general principle that an unrecorded deed is effective would not apply.

Creditor Rights

Some property transfer devices are subject to rights of the decedent's creditors against the property. However, many nonprobate transfer techniques have evolved in such a way that creditor rights are not recognized, or the law governing them is unclear. While that may be advantageous to a nonprobate transfer beneficiary, it is questionable whether it represents sound public policy.

The ability of the beneficiary's creditors to reach the beneficiary's expectancy interest in property that is the subject of a donative transfer also varies with the type of transfer. A creditor may have an immediate right to reach the asset in some cases; in other cases the creditor must wait until the decedent's death.

Taxes

The property transfer devices implicate variant tax consequences. Our concern here is with the estate tax, generation skipping transfer tax, gift tax, income tax, and property tax. The state inheritance tax was repealed in 1982, and was replaced by a state pick up tax equal to the amount of the federal estate tax credit.

Depending on the particular property transfer device, the property may or may not remain part of the decedent's taxable estate for estate tax and generation skipping transfer tax purposes. Property that passes from a decedent at death may receive a new basis (ordinarily stepped up) for income tax purposes.

But the federal taxation system is currently in flux. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the taxable estate exclusion increases steadily to $3.5 million in 2009, and the estate tax and generation skipping transfer tax are repealed in 2010. The repeal sunsets in 2011 and a taxable estate exclusion of $1 million is revived. Meanwhile the gift tax exclusion amount holds steady at $1 million. President Bush has undertaken an initiative this year to repeal the sunset and make the estate and generation skipping transfer tax repeals permanent.

With respect to property tax, real property passing from a decedent is reassessed when a "change in ownership" occurs. Special rules apply if the property passes to a spouse or domestic partner or is a personal residence passing to a child. The time when a change in ownership, and reassessment, occurs depends on the type of transfer used.

Medi-Cal Eligibility and Reimbursement

The decedent's objective in making a transfer of real property may be to reduce assets in order to achieve Medi-Cal eligibility, as well as to as to remove the property from the decedent's estate so that it will be immune from the state's claim for reimbursement of benefits provided to the decedent. Such a transfer may cause the transferor to lose Medi-Cal eligibility for a period of time. The decedent's principal residence is an exempt asset for Medi-Cal eligibility purposes, but may nonetheless be subject to the state's claim for reimbursement after the decedent's death.

The law is that the state may obtain reimbursement for the value of services provided to a Medi-Cal recipient from the recipient's "estate". The term is broadly defined, and includes property that passes to a beneficiary at the decedent's death through a variety of devices, including joint tenancy, survivorship, living trust, "or other arrangement." See 42 USC § 1396p(b)(4); see also Welf. & Inst. Code § 14009.5 (property of decedent passing by distribution or survival).

Lifetime Deed

One way for a decedent to make a quick, inexpensive, and effective transfer of real property is simply to make a lifetime deed of the property to the beneficiary, while retaining possession and control of the property until death.

That is always an option, of course, but it has its limitations. David Mandel notes that an outright transfer of property during lifetime (or adding an intended beneficiary as a joint tenant) is a poor option:

> While these can indeed effect a quick, smooth transfer without probate, they are irrevocable (unless the transferee agrees voluntarily to reverse the transfer); they put the owner's control and use of the property at risk if the transferee becomes abusive, asserting his or her right to possession, borrowing on the equity or transferring it to others (we have seen far too many instances of such abuse); they leave the property subject to execution stemming from the transferee's unrelated debts; they make it impossible for the owner to use the equity for his or her benefit, through a reverse mortgage, for instance; and they can cause highly unfavorable tax consequences for the transferee.

The decedent may attempt to avoid some of the adverse consequences of a lifetime deed by holding it unrecorded with other estate planning instruments,

or by giving it to the beneficiary with instructions to record it after the decedent's death. But these techniques may have unpredictable consequences.

Evaluation

- **Ownership Rights.** The decedent retains no ownership rights, and is at the sufferance of the beneficiary (may be mitigated by keeping deed secret).
- **Revocability.** Irrevocable (may be mitigated by keeping deed secret).
- **Cost and Ease of Transmission.** Simple and efficient.
- **Privacy.** Public record of transfer (may be mitigated by keeping deed secret).
- **Creditor Rights.** Creditors of decedent may not reach property. Creditors of beneficiary may reach property (may be mitigated by keeping deed secret).
- **Taxes.** Subject to gift tax and not part of decedent's taxable estate.
- **Medi-Cal Eligibility and Reimbursement.** Property not in decedent's estate for eligibility determination but transfer may affect eligibility.

Will or Intestate Succession

A decedent may transfer property at death by will or intestate succession. A will passes no interest in property until the decedent's death, and is revocable and may be revised up to the moment of death.

The property passes by operation of law at the decedent's death. It is subject to probate administration. The personal representative deeds the property to distributees pursuant to court order.

Probate Administration

Probate administration involves determination of heirs or devisees and settlement of debts and taxes. Court supervision is involved, and the procedure provides a forum in case of a dispute. Probate administration also includes family protections to ensure that the decedent's family is not left destitute, including family allowance and probate homestead. Because probate administration is a judicial proceeding all proceedings and records are public. Probate fees include filing fees, personal representative and legal fees, and probate referee fees.

A probate estate can seldom be closed more quickly than six months after the decedent's death. Even for a routine estate, nine months may be more typical.

The cost of probate administration is based on the value of the estate. A probate referee values the estate (for which the referee receives a small commission plus expenses). The personal representative is entitled to compensation on a sliding scale, starting and 4% on the first $100,000, going down to 1% of amounts between $1 million and $10 million, and allowing smaller percentages for larger estates. The estate attorney's compensation for ordinary services is on the same scale as the personal representative's. There are also filing fees and the like. A reasonable estimate is that combined fees for a routine $400,000 estate would be about $23,000.

Costs can be held down, and administration expedited, in a routine estate by use of "independent administration" procedures. These procedures involve reduced court supervision. However, there is an irreducible minimum time required for probate simply because time must be allowed for notice to creditors and processing of claims.

Probate administration acts in effect like a bankruptcy proceeding. It discharges the decedent's debts, and allows property to pass to beneficiaries free of creditor claims. The same cannot be said of the small estate proceedings described below.

Small Estate Proceedings

If the decedent's estate, or real property in it, is of relatively small value, it may pass by will or intestate succession without probate administration:

- In the case of an estate having a gross value under $100,000, the beneficiary may obtain a court order determining that the beneficiary has succeeded to the property. The proceeding may not be brought before 40 days have elapsed since the decedent's death. The beneficiary is liable for the decedent's debts, not exceeding the value of the property received.
- In the case of real property valued at $20,000 or less, the beneficiary may file and record an affidavit of succession. The beneficiary must wait at least six months after the decedent's death before using this procedure, and the beneficiary remains personally liable for the decedent's debts (limited to the value of the property and any income and interest generated by it).

These devices are of relatively little use for passing real property cheaply and expeditiously, since California real estate values have inflated in many cases

beyond the statutory limits. It is possible legislation will be introduced in the 2006 legislative session to increase these amounts.

Evaluation

- **Ownership Rights.** The decedent retains full ownership rights.
- **Revocability.** The decedent may revise or revoke disposition.
- **Cost and Ease of Transmission.** Costly and time consuming, except for small estate.
- **Privacy.** Privacy before death, publicity after death.
- **Creditor Rights.** Creditors of decedent may reach property in probate but are precluded after probate, unless small estate proceedings are used. Creditors of beneficiary have no access to property until distribution.
- **Taxes.** Property is part of taxable estate. Beneficiary receives new tax basis.
- **Medi-Cal Eligibility and Reimbursement.** Property remains in decedent's estate for eligibility determination, and is subject to reimbursement claim of state.

Intervivos Trust

Although there was a time when a will and probate was the standard means of passing property at death, that time is long gone. The instrument of choice for an estate planner today is the intervivos trust.

The concept of the living trust entered public consciousness in the 1960's with the publication of Dacey, *How to Avoid Probate* (1965). Under a Dacey Trust a settlor would put all of the settlor's property, not just real property, into a revocable trust with the settlor as trustee. The settlor would have full use of the property during the settlor's lifetime. On the settlor's death, the successor trustee would simply convey the property to the beneficiary designated in the trust.

This technique was viewed as an antidote to the delay and expense of probate. During the 1960's that was perhaps more of an issue than it is today, with the advent of independent administration and other techniques that have helped speed up the probate process and have limited its cost somewhat.

The intervivos trust is commonplace today, and trust instruments are much more sophisticated. One complaint about the trust as a device for transferring property at death is that a lawyer-drawn trust can be lengthy and costly. Self help books and software are available for the do it yourselfer; however, these

may require some sophistication. An inexpensive trust prepared by a "trust mill" could work; often it will be inappropriate for the particular individual, and may be used as a loss leader for sale of other products to the consumer such as insurance.

The expense of a trust is likely to be significantly less than the expense of probate administration. A trust provides a more expeditious means of transferring property at death than a will or intestate succession.

There are drawbacks to use of an intervivos trust. Family protections such as the probate homestead are unavailable to dependents of the decedent. The decedent's creditors may be able to reach the property if the estate is insufficient. It is noteworthy that California law allows the trustee to conduct an optional creditor claims procedure, parallel to the procedure available in probate proceedings, enabling the trustee to cut off creditor claims.

Often a trust is unfunded, i.e., the settlor fails to convey the property to the trustee. The trustee (or successor trustee) must be the owner of the property in order to make an effective conveyance of the property to the named beneficiary after the decedent's death. There is case law in California to the effect that real property may pass under a trust instrument even though the settlor has not executed a deed in favor of the trustee. See *Estate of Heggstad*, 16 CA 4th 943, 20 CR 2d 433 (1993). Whether a title company would be willing to insure title in such a case without a court determination of rights is questionable.

Trust property is included in the decedent's taxable estate for estate tax purposes. The beneficiary gets a step up in basis because the property is considered as having been acquired from a decedent. Though technically the decedent is not the owner of property transferred in trust, the decedent is considered the owner for estate tax purposes because the decedent retains revocation rights. Similarly, transfer of real property into trust does not trigger a property tax reassessment; that occurs only on distribution from the trust.

Evaluation

- **Ownership Rights.** The decedent retains possession of the property although technically the ownership rights are now in the trustee. The decedent ordinarily acts as trustee.
- **Revocability.** The decedent may revise or revoke the disposition.
- **Cost and Ease of Transmission.** Low cost both to create and implement a trust.

- **Privacy.** Can be kept private before death, but better practice and economy requires recordation of transfer during life.
- **Creditor Rights.** Creditors of decedent may reach property during decedent's lifetime; after death they may reach property to extent estate is inadequate. Procedure is available to flush out creditor claims after death. Creditors of beneficiary have no access to property until distribution.
- **Taxes.** Property is part of taxable estate. Beneficiary receives new tax basis. Creation of trust does not trigger reassessment.
- **Medi-Cal Eligibility and Reimbursement.** Property is considered part of decedent's estate for eligibility determination, and is subject to reimbursement claim of state.

Joint Tenancy

A classical way to pass real property to a beneficiary on death outside of property is through joint tenancy. That is a form of joint ownership of property, consisting of equal and undivided interests of the joint tenants during lifetime. After death the surviving joint tenant acquires ownership of the whole by right of survivorship. The surviving joint tenant records an affidavit of death in order to establish ownership.

Joint tenancy is problematic in a number of respects. Because it creates a present interest in the beneficiary, the beneficiary has immediate ownership rights. The gift is irrevocable and not subject to change by the decedent. The beneficiary may have different ideas about use of the property, or may seek partition. The beneficiary can encumber or sell the beneficiary's interest, and that interest is subject to claims of creditors. (On the other hand, when the decedent dies, the beneficiary takes the decedent's interest free of claims of the decedent's creditors.)

Creation of a joint tenancy is a gift of a present interest, and therefore may trigger a gift tax. At the decedent's death, the decedent's proportionate interest is included in the decedent's estate; the beneficiary receives a stepped up (or down) basis for the decedent's share.

Evaluation

- **Ownership Rights.** Immediate transfer of property interest.
- **Revocability.** Irrevocable.
- **Cost and Ease of Transmission.** Simple and economical.

- **Privacy.** Recordation of the deed is not necessary to create joint tenancy, but is at risk of intervening interests if unrecorded.
- **Creditor Rights.** Beneficiary's creditors may reach beneficiary's share during lifetime. On death of decedent, decedent's creditors lose rights against the property.
- **Taxes.** Taxable as gift on creation; includable in the decedent's estate; new income tax basis on decedent's share.
- **Medi-Cal Eligibility and Reimbursement.** May cause loss of eligibility, and fractional interest remains subject to state reimbursement.

Community Property

Our principal focus here is transfer of real property to the next generation, or to a third party. Therefore we will not devote much attention to passage of community property to the surviving spouse on the death of the decedent, other than to touch on a few salient features.

Either spouse has the right of testamentary disposition of one half the community property; absent a will the decedent's share passes to the surviving spouse. Community property receives favorable tax treatment. Effectuating the transfer is relatively efficient.

A new title form is authorized by statute — "community property with right of survivorship". It is hoped that the new title form will combine the best attributes of community property and joint tenancy for passing property to the surviving spouse. CPWROS is not subject to testamentary disposition, and its passage may be confirmed to the surviving spouse efficiently under the joint tenancy affidavit procedure. It is thought that the property will receive the double step up in tax basis that is a characteristic of community property, although federal treatment of the new form is not yet clear.

Evaluation

- **Ownership Rights.** Joint control. Limited to spouses and domestic partners.
- **Revocability.** Decedent may revoke CPWROS tenure and dispose of interest by will.
- **Cost and Ease of Transmission.** Inexpensive and efficient.
- **Privacy.** CPWROS must be recorded before death; confirmation by recorded affidavit after death.

- **Creditor Rights.** Creditors of either spouse may reach entire property before or after death.
- **Taxes.** Favorable tax treatment for both decedent and beneficiary.
- **Medi-Cal Eligibility and Reimbursement.** Interspousal transfer does not affect eligibility. No reimbursement claim against surviving spouse during survivor's lifetime.

Intervivos Transfer with Reserved Life Estate

A device that has been used to pass property at death outside probate but that is not common is an intervivos transfer of the property to the beneficiary, with the decedent reserving a life estate. On the decedent's death, the life tenancy interest is cleared by recordation of an affidavit of death.

Splitting title in this way is risky. Experience shows that conflicts may arise between the life tenancy and the remainder interest. Creditors of the remainder beneficiary may be able to reach the remainder interest, and perhaps force partition. Rights of the decedent's creditors against the property are terminated by the decedent's death. For tax purposes, the property is included in the decedent's estate.

This device is apparently effective to transfer property without affecting Medi-Cal eligibility, and without subjecting the property in the hands of the beneficiary to Medi-Cal reimbursement.

Evaluation

- **Ownership Rights.** Decedent retains possession during lifetime, but difficult issues concerning waste, etc.
- **Revocability.** Irrevocable.
- **Cost and Ease of Transmission.** Simple and cost effective.
- **Privacy.** Transfer must be recorded to be fully effective.
- **Creditor Rights.** Death of the decedent terminates rights of creditors of the decedent.
- **Taxes.** Taxable in same manner as estate property.
- **Medi-Cal Eligibility and Reimbursement.** Apparently will preserve Medi-Cal eligibility and will not subject the beneficiary to reimbursement liability.

Revocable Deed

California Law

Jim Birnberg observes that existing California case law already recognizes the revocable deed. He remarks that, "I am not sure whether the letters from lay people in support of DeVore's bill would wish a statute enacted if they knew about the California case authority for revocable deeds. Actually, I am not sure that most lawyers are aware of that case law either." Exhibit p. 16.

A revocable deed is a grant of real property subject to a life estate, with a reserved power of revocation. In other jurisdictions it is referred to as an "enhanced life estate" or as a "Lady Bird Deed".

A revocable deed was given in *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914). The grantor did not exercise the power of revocation during her lifetime; the grantee took the property on the grantor's death. Both the grantor's estate and her heirs sued to recover the property; the grantee (John Tennant Memorial Home) resisted on the ground that the deed made an effective nonprobate transfer of the property. The court held in favor of the grantee, validating the revocable deed:

> [The grantor] did then, in fact and in law, convey to the grantee the future estate which, at her death, became an estate in possession, to said grantee. The deed was not the same, in effect, as a will. It passed a present interest in the remainder, upon the contingency that the grantor should not, during her life, convey to another, or revoke the deed. The will would have had no such effect. The contingencies did not happen, hence the estate is now absolute.

167 Cal. at 579, 140 P. at 247.

Although this is a 1914 case, the revocable deed has remained in use in California. In *Bonta v. Burke*, 8 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002), for example, a Medi-Cal recipient executed a fee simple grant deed of her house to her daughters, but retained a life estate in the property and the right to revoke the remainder interest. The apparent intent was to reduce the recipient's assets for qualification purposes but at the same time retain a beneficial interest in the property and dispositional flexibility until death. On the death of the Medi-Cal recipient, the state Director of Health Services filed a reimbursement claim against the beneficiaries of the real property conveyed to them.

The *Bonta* court held that the revocable deed used in that case falls within the ambit of property that passes at the decedent's death for Medi-Cal purposes:

> We conclude that Smith [the Medi-Cal recipient] retained a significant "interest in property" until her death. As a life tenant she retained not only the enjoyment of the property but also, as the holder of the right to revoke the remainder, the unbridled power to divest her daughters of any interest whatsoever. As a consequence, the property had no value to them until Smith died. Consistent with the legislative policy of reaching assets not irrevocably transferred to beneficiaries, Smith's interest in the real property passed to her daughters at the time of her death, who took it by survival. The Department, therefore, is entitled to recover from the recipients of her property the cost of the medical services rendered to Smith. She received the services she needed during her lifetime and the State is entitled to reimbursement after her death.

98 Cal. App. 4th at 794, 120 Cal. Rptr. 2d at 77.

This is a very tricky type of transfer about which not much is known. There may be conflict between the life estate and contingent remainder. A decedent would be ill-advised to try this without benefit of counsel. Perhaps there are self-help forms that might make this an effectual nonprobate transfer device.

Other Jurisdictions

In other jurisdictions, the revocable deed is known as an "enhanced life estate" or as a "Lady Bird Deed" (It is said Texas law recognizes this type of deed, and that LBJ once used it to convey property to his wife Lady Bird Johnson). The deed takes the form of a quitclaim to a named beneficiary, reserving to the owner an "enhanced" life estate that includes the power to dispose of the property. If the owner transfers the property during lifetime to another person, the transfer would prevail over the claim of the quitclaim beneficiary. If there is no lifetime transfer, the property passes at death to the quitclaim beneficiary free of probate.

This type of nonprobate transfer of real property has been validated in Michigan. See Opinion of Michigan Probate Court for the County of Wayne, *In the Matter of the Estate of Dolores Ann Davis,* Case No. 2004-684984 (March 29, 2005); noted in 18 Quinnipiac Prob. L. J. 247 (2005). Under the Estate and Protected Individuals Code (EPIC) of Michigan it is possible for a grantor to convey an interest in real property and reserve a life estate coupled with the unrestricted power to convey the property during the grantor's lifetime. On the death of the grantor, the grantee succeeds to the property, assuming the grantor

has not exercised the power to convey. This method of transfer avoids probate on the death of the grantor, but enables the grantor to retain control over transfer of the property during lifetime. "The grantor may want to make it clear that the power to convey includes the power to sell, gift, mortgage, lease and otherwise dispose of the property." See Calhoun County Courts, *EPIC Questions and Answers*, <http://courts.co.calhoun.mi.us/epic0459.htm>.

It has been said that in Florida the enhanced life estate is used, rather than other forms of nonprobate transfer, because the transfer does not impact the transferor's Medicaid eligibility and the property is exempt from Medicaid recoupment and other claims against the transferor. Florida Guardianship Practice § 2.23 (4th ed. 2003). That would be different from the result in California.

Evaluation

- **Ownership Rights.** Owner retains control; may also be free of control by contingent remainder.
- **Revocability.** Owner may revoke transfer and execute transfer to new beneficiaries.
- **Cost and Ease of Transmission.** Simple and cost effective.
- **Privacy.** Recordation before death apparently not necessary, but subject to intervening interests.
- **Creditor Rights.** Life estate subject to decedent's creditors during lifetime; partition possible.
- **Taxes.** Includable in decedent's estate.
- **Medi-Cal Eligibility and Reimbursement.** Does not affect eligibility, but remainder interest subject to reimbursement.

Conveyance Pursuant to Nonprobate Transfer

Is it possible that California law already authorizes a direct conveyance of real property effective on death? The general nonprobate transfer law states:

> A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, **conveyance**, deed of gift, marital property agreement, or **other written instrument of a similar nature** is not invalid because the

> instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

Prob. Code § 5000(a).

The statute appears to address primarily an instrument in which the property being transferred is under the control of a third person — insurance proceeds, account, pension plan, trust, and the like — instances where a beneficiary designation has classically been recognized and effectuated by the person holding the asset. However, Section 5000 as drafted is broader than that, and it specifically refers to a conveyance and deed of gift.

This statute, and the Law Revision Commission's Comment to it, are drawn from the Uniform Probate Code. The Comment impliedly recognizes application of the provision to a real property transfer:

> The phrase "or other written instrument of a similar nature" has been substituted in subdivision (a) of Section 5000 for the language "or any other written instrument effective as a contract, gift, conveyance, or trust" (which was found in the introductory portion of subdivision (a) of Section 160 of the repealed Probate Code). The Supreme Court of Washington read the replaced language to relieve against the delivery requirement of the law of deeds. See In re Estate of O'Brien, 109 Wash.2d 913, 749 P.2d 154 (1988). The substitution of the language in subdivision (a) makes clear that Section 5000 does not have this effect. See First Nat'l Bank of Minot v. Bloom, 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that "nothing in ... the Uniform Probate Code [provision] eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another."

The *O'Brien* case disapproved in the Comment involved unconditional deeds of real property executed by the donor to a named beneficiary (her daughter). The donor kept possession of the property throughout her life, and held the deeds undelivered in a safe deposit box with the intent to pass the property to her daughter at her death. The Washington court held that under the Uniform Act, delivery of the deeds was unnecessary and the donor's intent to make a nonprobate transfer on death was effectuated.

The Comment's disapproval of *O'Brien* goes only to the delivery requirement, not the ability to make a nonprobate conveyance of real property effective at death. The dissenters in O'Brien make this point. "The majority's conclusion that the deeds meet the legal requirements of delivery should have ended the matter as a valid deed is effective to pass an interest at death. The majority, however,

goes on to hold that these undelivered deeds effectively passed title to Robinson by operation of [the nonprobate transfer statute]." 109 Wash.2d at 921, 749 P.2d at 158.

The Comment cites with approval the *Bloom* case, which holds on similar facts that the nonprobate transfer statute does not validate an undelivered deed. "There is nothing in that section of the Uniform Probate Code or any other section of the Century Code which eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another. In this case, we have upheld the finding of the district court that there was no actual or constructive delivery of the deed, and therefore the deed is not effective." 264 N.W.2d at 212 (citations omitted).

Prof. McCouch observes that "The fundamental problem is that the catch-all clause does not define its own scope with any precision. Indeed, it cannot do so if it is to remain sufficiently flexible to embrace new and evolving will substitutes. Although the UPC official comment expressly approves *Bloom* and disapproves *O'Brien*, it fails to identify any additional transactions that the revised statute is intended to validate." McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1135-36 (citations omitted).

Presumably, in either of these cases, if a real property deed conditioned to take effect at the donor's death had been delivered to the beneficiary, it would have been effective under the general nonprobate transfer statute. Michigan, for example, has the same language in its Estates and Protected Persons Code (EPIC). Michigan recognizes as valid a real property deed that provides a conveyance on death pursuant to the general nonprobate transfer statute. See Calhoun County Courts, *EPIC Questions and Answers*, <http://courts.co.calhoun.mi.us/epic0220.htm>.

The Michigan panel advises caution in the use of this device:

> MCL 700.6101 should be used with caution because of the ramifications of the transaction. A deed transferring real estate on death is not a revocable transaction. The original owner cannot reclaim the property or cancel the designation. The original owner can no longer convey or mortgage the property without the consent of the designated taker on death. The execution and delivery (recording) of the deed has income, estate and gift tax implications which are beyond the scope of this panel. The transaction may also have implications for Medicaid purposes such as whether the real estate continues to be an exempt asset.

Prof. McCouch suggests that the general nonprobate transfer law could be improved by specifying formalities in the case of a nonprobate transfer of real property:

> The UPC drafters might consider authorizing a form of deed that would transfer real property at the owner's death, relying on the recording system as a substitute for probate formalities. Under such a statute, an owner would be able to execute and record a deed which expressly conveys real property at death and has no effect on legal ownership or control during the owner's life. Mechanically, such a deathtime transfer is just as simple as a conventional joint tenancy or a lifetime conveyance with retained life estate. It also raises no greater danger of fraud or mistake than any other beneficiary designation. To preserve the integrity of the recording system, however, the owner should be required to comply with the recording formalities in exercising any retained power of appointment under a recorded deed.

Id. at 1143 (citations omitted). That is exactly what the UPC drafters have recently decided to pursue.

Evaluation

We cannot evaluate this device, assuming it is available in California, because none of its attributes has been defined or tested. In fact, the specification and evaluation of the attributes of a transfer on death deed, or beneficiary deed, is what this study is about.

BENEFICIARY DEED

Jurisdictions that Recognize this Device

At least eight jurisdictions now authorize a beneficiary deed. They are, in order of enactment:

- Missouri: Mo. Rev. Stat. § 461.025 (1989)
- Kansas: Kan. Stat. Ann. § 59-3501 (1997)
- Ohio: Ohio Rev. Code Ann. § 5302.22 (2000)
- New Mexico: N.M. Stat. Ann. § 45-6-401 (2001)
- Arizona: Ariz. Rev. Stat. § 33-405 (2001)
- Nevada: Nev. Rev. Stat. § 111.109 (2003)
- Colorado: Colo. Rev. Stat. § 15-15-401 (2004)
- Arkansas: Ark. Code Ann. § 18-12-608 (2005)

In addition, the Joint Editorial Board for Uniform Trusts and Estates Acts has approved a proposal that the National Conference of Commissioners on Uniform

State Laws prepare uniform legislation on the matter. Assuming NCCUSL decides to go ahead with that effort, it will be too late to provide us any assistance on this project.

Operation of this Device

The beneficiary deed, or transfer on death deed (as it is referred to in three of the eight jurisdictions that recognize it), is a deed of real property that designates a beneficiary to which the property will pass on the decedent's death. The general operation of this device is described below. There are exceptions and variations from one jurisdiction to the next, which we will get into later.

The deed must state prominently that no interest in the property is conveyed until the decedent's death. The deed need not be delivered to the beneficiary. The deed must be recorded before death to be effective as a transfer, and the property passes to the beneficiary outside of probate. Before that time the deed can be revoked, and a new transfer on death deed executed to a different beneficiary. A beneficiary has no present interest in the property, which remains within the decedent's absolute possession and control.

The transfer on death is not affected by the decedent's will. But if the beneficiary fails to survive the decedent, the property passes through the decedent's estate.

The property is subject to creditor claims against the decedent. A secured obligation is enforceable against the property.

The property is taxable in the same manner as property in the decedent's estate. The Medicaid consequences vary from jurisdiction to jurisdiction.

To effectuate the transfer, the beneficiary records a death certificate.

Experience in Other Jurisdictions

We have reviewed the legal literature, and summarize it here. We are also making inquiry of stakeholders in jurisdictions that have enacted beneficiary deed legislation. We will supplement this memorandum with any additional information we obtain.

As a general matter, the California Land Title Association has observed that, "In many of the states that have created TODDs (Arizona, New Mexico, Ohio, etc.), the problems the title industry has encountered all flow from the fact that no one seems to understand what, if any, present interest is created in favor of the grantees in a TODD." Assem. Judic. Comm., Analysis of AB 12 (5/3/2005).

Missouri (1989)

The Missouri statute has been in effect the longest, and we therefore have the most experience under it. The beneficiary deed is widely used in Missouri, and has become routine. A reliable estimate is that there are some 300,000 beneficiary deeds currently of record in Missouri.

Estate planning attorneys typically use the beneficiary deed in smaller estates. However, even an attorney that does sophisticated estate planning may use it on occasion, particularly where the client wishes to hold the main residence in joint tenancy outside a living trust. Missouri estate planners are surprised that the beneficiary deed is not in effect in all 50 states.

When the beneficiary deed legislation was first enacted, title insurers were not enthusiastic about it. However, their concerns never materialized; now title companies insure beneficiary deed titles as a matter of course.

The Missouri statute provides the formalities and rules necessary to make an effective transfer outside of probate, and addresses many topics concerning the use of the transfer. See Missouri Estate Planning, Will Drafting and Estate Administration Forms § 3.7 (2005).

There have been a few cases under the Missouri statute. *Estate of Dugger*, 110 S.W. 3d 423 (2003), involved a beneficiary deed that was executed but unrecorded at the grantor's death. This was not a valid nonprobate transfer under the statute, which requires that the deed be recorded before death as a formality that takes the place of the delivery requirement.

Pippin v. Pippin, 154 S.W. 3d 376 (2004), involved a beneficiary deed that did not expressly state it was to become effective on the death of the owner. The deed said it was to become effective on the last to die of joint grantors. The court held the deed was not a valid nonprobate transfer under the statute, which requires a statement in the deed that it is effective on the death of the owner. (The dissent would have effectuated the deed, based on the clear intent of the grantor.) *Pippin* caused some consternation in practice; attorneys were advised to review previously executed deeds due to the possibility they could fail under the *Pippin* test, and to execute new deeds that included the magic words. Meanwhile, it appears that quick legislative action has cured the problem.

Kansas (1997)

The Kansas statute was designed to aid elder law practitioners and clients in providing an alternative to a will or other nonprobate device. It was felt that the

clear statutory language would enable clients and practitioners to feel safe that if the deed was formed according to the statute there would be no problems in its operation.

There is some indication that the Kansas bar finds the transfer on death deed preferable to joint tenancy as a means of transferring property at death without probate:

> A better alternative in many situations for transferring an interest in real estate a death and avoiding probate is titling the real estate in transfer-on-death. A transfer-on-death deed will transfer ownership of the interest upon the death of the owner. The grantee designation may be changed or revoked at any time during the life of the owner without the consent of the grantee.

Kansas Real Estate Practice and Procedure Handbook § 3.18 (KS Bar Ass'n 1999). See also Kansas Long Term Care Handbook § 1.48 (KS Bar Ass'n 2001) ("This new law is an estate planning tool solving the problem of transferring real estate without probate and without the pitfalls of joint tenancy.")

The Kansas Bar material also includes a listing of perceived advantages and disadvantages of the transfer on death deed:

> The fact that a grantee beneficiary or beneficiaries has no ownership in the property during the lifetime of the record owner affords the following advantages that are not available under joint tenancy ownership.
>
> - The owner does not need to have the signature of the beneficiary.
> - The property is not subject to the grantee beneficiary's debts.
> - The property is not subject to the rights of the grantee beneficiary's spouse.
> - The property is not affected by the incapacity of the grantee beneficiary or the grantee beneficiary's spouse.
> - The grantee beneficiary does not need to know about the beneficiary designation.
> - The designation does not disqualify the owner for Medicaid.
> - The designation can be revoked without the signature of the grantee beneficiary.
> - A new designation can be executed without having to revoke the old one.
> - The owner can pass property to a trust under the beneficiary designation.
> - The designation is a will substitute and avoids probate.

> This is a relatively new law and there have been no reported cases. Some of the disadvantages of using a transfer-on-death deed are:
>
> - What happens to the contents of the home and items of personalty?
> - Who is going to pay the bills?
> - If there are minors, a conservator must be appointed to manage or sell the property.
> - If one of the grantee beneficiaries is incapacitated with no agent under a financial durable power of attorney, a conservator must be appointed to manage or sell the property.
> - The real estate is subject to Estate Recovery.
>
> No matter how real estate is passed, it may be subject to estate tax, and it is taken subject to any mortgages and liens on the property.

Kansas Long-Term Care Handbook § 1.48 (KS Bar Assn. 2001).

Ohio (2000)

The transfer on death deed appears to be used and useful in Ohio. It has been said that it "adds to the arsenal" of methods to avoid probate. The "most important advantage of a transfer-on-death (TOD) deed is that the beneficiary or beneficiaries have no interest in the property during the lifetime of the owner of the interest." 1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. § 14:20 (2005). The formalities must be complied with, however, and the transfer fails if the decedent fails to record the deed before death. *In re Estate of Scott*, 2005 WL 2979668 (Nov. 4, 2005).

It has been suggested that one of the advantages of the device in Ohio is that it ensures continuing title insurance coverage, unlike some other lifetime estate planning transfers such as a spousal transfer or a transfer in trust. "By using this form of ownership, both the tax planning and probate avoidance objectives are achieved, while title insurance coverage is preserved because the original insured remains the owner after the conveyance." Bidar, *One Step Forward and Two Steps Back?*, 13 Prob. L. J. of Ohio 61 (Jan./Feb. 2003).

New Mexico (2001)

Experienced New Mexico title insurers indicate that the TOD deed statute is working well there. The only problem is that the beneficiary's rights are subject to the statutory widow's allowance and the statutory children's allowance, both provided by New Mexico's probate law. If the TOD beneficiary wants to sell

or mortgage the property after the decedent's death, the title company asks that a probate of the decedent's estate be opened, if one is not already open, and a release obtained from the personal representative.

Experts caution that a transfer on death deed must be drafted and recorded properly. Adverse experience has been reported where the deed was unrecorded at the decedent's death. Having an attorney draft the deed is wise, and coordinating with an estate plan is also important. See Rudd, *Ask the Probate Judge — Transfer on Death Deeds*, Albuquerque Journal (2/27/2003).

The Senior Citizens' Law Office of Albuquerque, New Mexico, echoes these concerns in its on line advice. It notes that the transfer on death deed is relatively new and may require skillful drafting, as well as coordination with the estate plan. It is probably safest to seek an attorney to help with a transfer on death deed.

Arizona (2001)

There is some indication that the estate planning bar in Arizona finds that the device fills a need:

> The beneficiary deed is an ideal tool for the married couple or person with a simple, modest-sized estate. This typically would involve someone whose primary asset is a paid-off home. The modest size of the estate usually does not warrant the expense of a revocable trust. Because the equity in the home will likely exceed $50,000, a probate proceeding would normally have to be commenced upon the death of the owner because the $50,000 limitation for real property affidavits has been exceeded. The good news is that the probate process can now be avoided through the use of this new deed.

Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002) (footnote omitted).

However, practitioners have also noted problems. One is that if the decedent is a joint tenant, the survivor may undo the beneficiary deed.

Also, there are technical requirements for recordation. An improperly drafted deed or one that does not conform to all of the legal requirements may create problems that are not discovered for quite some time, when it may be too late to correct them.

Title companies have been concerned about potential problems relating to security interests. The owner must revoke the deed in order to obtain financing,

due to priority concerns. And the statute may require notice to the named beneficiary in a trustee's sale under a deed of trust.

Nevada (2003)

Preliminary indications from Nevada are that the device is infrequently used. Most owners of real property have other assets as well, and for that purpose a trust is the preferred device for disposing of the entire estate.

Colorado (2004)

This statute apparently replaces an older transfer on death deed statute that had left many questions unanswered.

There is some indication from the practicing bar that the new statute, because it answers many questions, will pave the way for increased use of the beneficiary deed. It is believed that it will help avoid the need to probate a smaller estate that includes real property.

Arkansas (2005)

Practitioners we have spoken with are unfamiliar with the new device. The Arkansas Law Review has not yet published anything concerning it.

RESOLUTION OF ISSUES

If a beneficiary deed were authorized in California, what would it look like? How would it operate in practice? What would be its effect on the rights of the owner, beneficiaries, family members, creditors, third party transferees? How would it affect taxes and Medi-Cal? Would there be a statutory form?

Undoubtedly additional issues will surface as we review experience with this device in other jurisdictions. We need to make sure that we address all issues that persons concerned about AB 12 think are important. To this end, **the staff solicits input from interested persons** about issues they believe need to be addressed in the study. That includes banks, probate referees, and estate planners, as well as judges, probate lawyers, and title insurers. We have already received substantial input from individuals who believe authorization of a beneficiary deed would be beneficial. See "Comments of Interested Persons" above.

A beneficiary deed cannot be processed the same way other nonprobate transfers are processed. Other forms of nonprobate transfer typically involve a third party to effectuate the transfer or to issue new title — a bank, a transfer

agent, a trustee. In a probate proceeding, of course, there is a court to issue a decree of title, or a court appointed personal representative to transfer title. To a significant extent the rights of a transferee under a beneficiary deed must depend on the mechanism of title insurance. The input of title insurers on this study will be critical if we are to make an adequate assessment of this device, and to make any draft of it workable.

This memorandum begins the process of reviewing issues relating to the beneficiary deed. We deal with operational issues in this memorandum — capacity, execution, recording, effect of other instruments, effectuation of the transfer, contests, and the like. We will in a subsequent memorandum address issues relating to rights of the owner (including revocability and multiple ownership questions), beneficiaries (including dissolution of marriage, disclaimer, and lapse), family members (including probate homestead and omitted spouse), creditors (rights of secured and unsecured creditors of the decedent and beneficiary), third party transferees (including encumbrancers), taxes (estate tax and income tax), Medi-Cal (eligibility and reimbursement), and statutory form.

After we have completed the process of reviewing and addressing these issues, we will be in a position to take a step back, see what we have, and decide whether it makes any sense.

OPERATIONAL ISSUES

Capacity

The beneficiary deed is a will substitute. The legal capacity to make a will is a lower standard than the legal capacity to make a real property transfer.

To make a will, the decedent must understand the nature of the act, the nature of the property, and the decedent's relationship to family members and others. To make a real property transfer, the decedent must have the capacity to contract; that requires that the decedent understand the rights, duties, and responsibilities created by the act being performed, the probable consequences of the act for the decedent and other persons affected by it, and the significant risks, benefits, and reasonable alternatives to the act.

There is some indication in the case law that to make a gift deed, the transferor need only have testamentary capacity, not contractual capacity. *Goldman v. Goldman*, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

None of the eight beneficiary deed jurisdictions has addressed this issue. Presumably in those jurisdictions it will be the higher contract standard that prevails, but there is no case law on the point.

The staff believes the issue is bound to come up. We can clarify matters by addressing it directly and thereby avoid litigation to find out the answer.

Because the beneficiary deed, like a will, is intended to transfer real property at death, it would be logical to apply the testamentary standard to it. Is a person who does not have contractual capacity likely to be susceptible to fraud, duress, and undue influence? That danger is addressed somewhat, in the will context, by the requirement that the instrument be witnessed. A real property deed, on the other hand, is not ordinarily witnessed. The authenticity of the deed is protected by the notarization requirement.

If a decedent's will is challenged for lack of testamentary capacity, that issue is resolved in the probate proceeding, before property is transferred to a beneficiary. In the case of a beneficiary deed, the property passes directly to the beneficiary; any challenge to the transfer is retroactive. That should not be a significant problem in the case of real property, since the property is not going anywhere. It could be subject to waste or encumbrance. A related issue is whether there should be a period of time before the beneficiary may pass good title, to enable any challenges to the validity of the transfer. That issue is discussed under "Contest" below.

The staff would make clear that testamentary capacity is sufficient to enable execution of a beneficiary deed. The possibility of fraud, duress, or undue influence would be controlled by execution formalities and the availability of a post death challenge.

Execution of Deed

Most states simply require that a beneficiary deed be signed and dated by the record owner. Because the deed must be recorded to be effective (see discussion below), it must necessarily be acknowledged as well. **These are straightforward execution requirements that should be included in any beneficiary deed legislation.**

Most statutes state explicitly that the deed not be supported by consideration. Such a provision is probably unnecessary in California, where that is already the general rule. See, e.g., Civ. Code § 1040.

Although the beneficiary deed is a will substitute, no state requires that it be witnessed. In California a witness is not required for any of the authorized types of nonprobate transfer — e.g., creation of a trust or designation of a pay on death beneficiary for an insurance policy, pension plan, securities account, or account in a financial institution.

When this issue came before the State Bar of California's Conference of Delegates, the resolutions committee noted that the use of witnesses would not reduce the likelihood of undue influence. (If the requirement of two witnesses would not serve a useful function for a beneficiary deed, one wonders whether it actually serves a useful function in the execution of a will.)

Many of the authorized nonprobate transfer instruments involve a third party intermediary that oversees the execution of a real property deed. To some extent, acknowledgment before a notary serves a similar function with respect to a real property deed. However, a notary has no responsibility to assess the capacity of the decedent or the possibility of fraud, duress, or undue influence.

One of the reasons for requiring that a will be witnessed is that it helps impress on the decedent the significance of the act. For that purpose, appearance before a notary perhaps would achieve the same effect with respect to execution of a beneficiary deed.

On balance, the **staff thinks witnessing should not be required**. A witness is not required for an outright gift of real property, which may have a greater impact on the decedent than a revocable gift effective at death. This new device will operate more smoothly to the extent it invokes standard real property conveyance procedures.

Delivery

Ordinarily an executed deed of real property is not effective unless delivered to the transferee. Should a beneficiary deed be any different?

In Arizona, title companies have expressed concern about whether they may insure title based on an undelivered beneficiary deed. The Arizona statute is silent on the matter. Although the statute's silence may indicate that delivery is unnecessary, practitioners advise that the better course of action is to have the deed delivered to the beneficiary, who should sign and notarize it. That is apparently standard conveyancing practice in that state.

The only states that address the delivery question directly are Missouri and Ohio. Their statutes provide explicitly that delivery is not required. "The

requirement that the [beneficiary] deed be recorded before death is the formality that takes the place of the delivery requirement." *Estate of Dugger*, 110 S.W. 3d 423, 428 (2003).

The staff believes the Missouri analysis is correct. Delivery helps ensure that the transfer is intentional. A person who executes a deed but never delivers it may have decided against the transfer. But assuming a beneficiary deed must be recorded before the decedent's death to be effective, then delivery to the beneficiary is unnecessary. See discussion of "Recordation" below.

The staff thinks **the statute should state explicitly that delivery is unnecessary**. This is particularly important in California where the Comment to Probate Code Section 5000 — the general nonprobate transfer statute — may be read to suggest that the delivery requirement of the law of deeds is applicable. See discussion of "Conveyance Pursuant to Nonprobate Transfer" above.

Acceptance

Every state that has enacted beneficiary deed legislation provides that the signature, consent, or agreement of, or notice to, the beneficiary is not required for any purpose during the lifetime of the owner. **Such a provision is perhaps necessary** due to the common law of deeds requirement of acceptance, although in California acceptance is presumed if the deed is beneficial to the transferee.

If we conclude that delivery is not required for a beneficiary deed (see discussion of "Delivery" above), then acceptance during the decedent's lifetime cannot be required. The beneficiary may still disclaim, if appropriate, after the decedent's death. Disclaimer issues are discussed in a subsequent memorandum.

Recordation

A decedent may execute a beneficiary deed but hold it unrecorded for any number of reasons, including reluctance to publicize it, uncertainty, a change of mind, or simple disorganization or forgetfulness. Must the deed be recorded by the owner, or during the owner's lifetime, or can it be held by the decedent until the time of death and recorded later by another person?

If the deed is not recorded during the decedent's lifetime, is there any assurance that the decedent intended to go through with the transfer? Also unsettling is the possibility that the decedent did intend to go through with the transfer, but a disappointed heir finds the unrecorded deed, whether before or after the decedent's death, and destroys it.

Every state that has beneficiary deed legislation requires that the deed be recorded before the death of the owner in the county where the real property is located. The original Nevada statute did not require recordation, but it has been since amended to require it.

It is said that recordation prevents surprise through a "pocket deed". It has also been argued that the requirement that recordation be accomplished before death limits the possibility of undue influence or a "deathbed transfer". Kirtland & Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law. 118, 120 (2005).

Recordation cannot eliminate the possibility of fraud, duress, or undue influence. But it can minimize it by allowing fewer opportunities for manipulation. Particularly if delivery is not required for an effective transfer, the formality of recordation during the decedent's lifetime will help ensure that the decedent's intent is effectuated.

The State Bar Trusts and Estates Section has pointed out that recording the deed "makes the transaction public, so that if mischief is afoot, the mischief will be detectable." That assumes, of course, that people are paying attention to recorded instruments affecting the property. The staff thinks that is unlikely.

The decedent may well not want to publicize the donative transfer. There may be issues among potential heirs about who should get the property. There may be a concern that a beneficiary who learns of the deed will become idle.

David Mandel of Senior Legal Hotline would go further and require prompt recording after execution of the deed. He argues that prompt recording would open the deed to public knowledge and scrutiny by other interested parties. He believes that would make a beneficiary deed far safer than other estate planning tools. He proposes that to be effective a beneficiary deed must be recorded within 30 days after execution, or before the decedent's death, whichever occurs first.

We would require that a beneficiary deed be recorded before the decedent's death. We are also attracted by Mr. Mandel's suggestion that it be recorded within 30 days after execution. That would protect against a disappointed heir finding and recording a stray unrecorded deed that the decedent had executed and then decided against. It would also modulate the "Battle of Recorded Deeds" discussed below.

The State Bar Trusts and Estates Section is concerned about unanticipated tax consequences of a pre-death recordation requirement. We will address this

matter in connection with our larger discussion of tax issues in a subsequent memorandum.

The recording requirement could frustrate the decedent's intent where the decedent fails to act diligently. It has been our experience with trusts, for example, that a settlor often neglects to fund the trust, failing to make appropriate transfers into the trust. Experience suggests that the decedent's neglect will be a problem with a beneficiary deed as well. The *Dugger* case in Missouri and the *Scott* case in Ohio illustrate the point. Practitioners in Arizona have cautioned that the attorney drafting the deed should assume the obligation of recording it. However, these deeds may be executed without advice of counsel.

The effect of failure to record the deed during the decedent's lifetime (or within a prescribed period) is that the deed is ineffective. Presumably the property will then pass under the decedent's will, or by intestacy. None of the expected nonprobate transfer benefits will be realized, and a person other than the intended beneficiary may receive the property.

Battle of Recorded Deeds

Let us assume a recorded beneficiary deed is revoked by recordation of a subsequent beneficiary deed. (The general question of revocability will be addressed in a subsequent memorandum.)

A decedent may execute a sequence of deeds, in favor of different beneficiaries. If the decedent executes and records each in succession, there should be no problem. The last in time should prevail.

But suppose the decedent records none of them. After the decedent loses capacity, the decedent's would be heirs discover the unrecorded deeds. Each one wants to record the deed most favorable to that beneficiary. If all are recorded, which prevails — the last one executed, or the last one recorded? If it is the last recorded, we can visualize a high stakes gamble, in which each beneficiary tries to outwait the other, but not so long that the decedent dies before recordation.

Most jurisdictions seem to provide that the last executed deed, not the last recorded, controls. There is some ambiguity in the drafting of the statutes. Arizona on the other hand provides clearly that "If an owner executes and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner's death is the effective beneficiary deed." Ariz. Rev. Stat. § 33-405(G). But this assumes that it is the

owner that records the deed, rather than the beneficiary. The water is muddied by the fact that often the beneficiary will be acting at the decedent's direction and as the decedent's agent.

When the present proposal was before the State Bar of California's Conference of Delegates, the Resolutions Committee voted to disapprove. One of the reasons was, "In the event a property owner executes multiple beneficiary deeds at different times, the true intent of the property owner may not be followed if the deeds are not recorded in the order in which they were signed." Exhibit p. 17.

The staff believes the majority rule is the better rule — **the last executed of the recorded deeds should prevail**. This will help prevent fraud. This ought not to cause title insurance problems, since only a recorded beneficiary deed has the potential to override an earlier recorded beneficiary deed, and then only if its date of execution is later.

An additional measure of protection would be achieved by requiring prompt recordation of an executed deed, although we are ambivalent about such a requirement. See discussion of "Recordation" above.

Effect of Other Instruments

The property that is the subject of a beneficiary deed may also be the subject of another dispositive instrument that is intended to take effect on the decedent's death. For example, the decedent's will may purport to dispose of the property, or the decedent's trust, or the property itself may be held in joint tenancy form, or in community property form with or without right of survivorship. Which prevails?

Testamentary Disposition

> Consider the situation where an owner designates *A* as beneficiary of a nonprobate transfer of property at death and later executes a valid will specifically devising the same property to *B*. In the absence of an applicable statute, the result depends in the first instance on whether the governing instrument for the nonprobate transfer expressly permits or prohibits amendment or revocation of a beneficiary designation by will. If the governing instrument is silent, the result may depend on the type of will substitute. In the reverse situation, where the owner designates *A* as beneficiary after executing the will in *B*'s favor the analysis is slightly different. Here, the only sensible result is to treat the nonprobate transfer as removing the underlying property from the probate system; otherwise the beneficiary designation has no effect.

McCouch, *id*. at 1146-47 (fns. omitted).

The Trusts and Estates Section of the California Bar Association is concerned about this problem as well. They refer to the case of *Gardenhire v. Superior Court*, 127 Cal. App. 4th 882, 26 Cal. Rptr. 3d 143 (2005), which required almost three years of litigation and a court of appeal decision to resolve the question whether a disposition of real property in a will overrode a different disposition of that property in an earlier executed but revocable trust. (The answer in that case was that, under the terms of the revocable trust, the will did override the trust.)

A significant problem with allowing a will to override a beneficiary deed is that it undermines the efficacy of the deed. A title company may be unwilling to insure title absent an order of the probate court determining that there is no valid will providing for a different disposition. See also McCouch, *id*. at 1149 ("In the absence of an express provision, however, a statutory presumption against amendment or revocation by will may be justified to preserve the autonomy of nonprobate transfers and avoid unnecessary entanglement with the probate system.")

And in fact, most jurisdictions provide that a beneficiary deed cannot be revoked or changed by will. The remainder are silent on the issue. **We would follow the majority rule and make it clear that a will cannot override a beneficiary deed.** Unless, of course, the beneficiary deed is revoked by following prescribed revocation procedures. Issues relating to revocability and the manner of revocation are discussed in a subsequent memorandum.

The Missouri statute admits of an exception where the beneficiary designation itself expressly grants the owner the right to revoke or change a beneficiary designation by will. Mo. Rev. Stat. § 461.033(4). The staff thinks such a provision in a beneficiary deed would be counterproductive; we would not encourage it by mentioning it in the statute. We discuss this concept further in a subsequent memorandum in connection with the reserved property rights of the decedent.

Trust

In case of a conflict between a beneficiary deed and a trust affecting the same property, the considerations are somewhat different from those relating to a will.

Take the case where the decedent executes and records a beneficiary deed, and some time later creates a trust that purports to make a different disposition of the property on the decedent's death. Assuming a beneficiary deed is

revocable, it should be permissible for the decedent to revoke the deed by making a different disposition in trust. However, the staff thinks **this should be allowed only if the transfer of the property in trust is properly recorded before the decedent's death**. If the beneficiary deed system is to function efficiently, we must be able to rely on the primacy of the recorded instrument.

Now take the reverse sequence of events — the decedent creates a trust affecting the property and subsequently records a beneficiary deed making a different disposition of the same property on the decedent's death. A trust is a lifetime transfer of the property by the decedent; once the property is transferred in trust, the decedent is no longer the owner. The trust or the trustee is the owner.

In order for the decedent to make an effective disposition of trust property by beneficiary deed, the decedent will first need to revoke the trust as to that property. That would be possible to do if the trust is revocable, but not if it is irrevocable.

The more difficult question arises where the prior transfer of property in trust is unrecorded, and the decedent simply records a subsequent beneficiary deed without jumping through the prior revocation hoops. When the decedent dies, as far as the beneficiary is concerned, or a BFP from the beneficiary, or a title insurer, the passage of property from the decedent to the beneficiary is complete. But from the perspective of a trust beneficiary, particularly of an irrevocable trust, the beneficiary deed is simply an invalid attempt to convey property by an owner who no longer has an interest in it.

Again, the staff thinks we have to give primacy to the recorded instrument if the beneficiary deed scheme is to function properly. **We would make clear in the statute that a recorded beneficiary deed prevails over an unrecorded transfer in trust.**

Joint Tenancy

Does a beneficiary deed take priority over survivorship rights associated with property held in joint tenancy form? Does it matter in which order the beneficiary deed and joint tenancy are created or recorded?

The beneficiary deed is basically an effort to achieve the advantageous dispositional aspects of joint tenancy (simple and inexpensive passage of property to the survivor outside probate) without its adverse lifetime consequences (creation of present interest in joint tenant). It is quite likely that a

decedent inclined to make use of a beneficiary deed for a particular piece of property may have already recorded a joint tenancy deed for that property.

Creation of a joint tenancy is irrevocable. Unless the joint tenant joins in a reconveyance, the beneficiary deed cannot affect the joint tenant's interest in the property. Unless, of course, that joint tenant dies first, in which case the survivor re-acquires the joint tenant's interest by right of survivorship; the beneficiary deed would presumably then act upon the entire property. The staff sees no need to elaborate this result — the case law undoubtedly would reach that conclusion through application of standard common law joint tenancy principles.

But assuming the joint tenant survives the decedent, can the decedent create a beneficiary deed that sends the decedent's interest to a person other than that joint tenant? Or is the joint tenant's right of survivorship paramount? Although the joint tenant has an irrevocable ownership interest in the property, the survivorship right is terminable. A "severance" can be effectuated by a transfer of a joint tenant's interest, or simply by recordation of an instrument severing the joint tenancy. Civ. Code § 683.2.

It is likely that a recorded beneficiary deed would be considered a severance of the joint tenancy, although **it probably would be useful to make this explicit in the statute**. In this connection, it is worth noting that a deathbed severing instrument may be effectively recorded within seven days after the decedent's death. Civ. Code § 683.2(c)(2). Perhaps **this should be made an exception** to the general rule that a beneficiary deed is ineffective unless recorded before the decedent's death. The consequence of such an exception is that joint tenancy property would not be marketable for a week after a joint tenant's death; this does not seem overly drastic to the staff.

The staff's conclusion that the decedent should be able to sever the joint tenancy and effectively pass the decedent's interest in the property to a named beneficiary appears to be unique among jurisdictions that have enacted beneficiary deed legislation. Arizona, Arkansas, and Colorado, for example, make clear that a joint tenant may execute a beneficiary deed without approval of other joint tenants, but the beneficiary deed is effective only if the decedent survives all other joint tenants. In no case do these jurisdictions provide that a beneficiary takes an interest over a surviving joint tenant.

What about the opposite sequence — the decedent records a beneficiary deed and sometime thereafter creates a joint tenancy affecting the same property? Assuming a beneficiary deed is revocable, recordation of a later executed joint

tenancy deed would have to be viewed as a revocation of the beneficiary deed. **The statute establishing a beneficiary deed and prescribing revocability should be so drafted that it is clear** that recordation of a later executed instrument creating a joint tenancy in the property revokes a beneficiary deed to the property.

Should the decedent's **unrecorded** joint tenancy deed revoke a previously recorded beneficiary deed? Theoretically, the unrecorded joint tenancy deed should be effective to revoke the previous beneficiary deed, except to the extent a bona fide purchaser or encumbrancer may have relied on the apparent nonprobate transfer of record. But the staff would be reluctant to further complicate what should be a fairly straightforward transfer scheme by allowing for such an off-record cloud on title. It would make a title company less willing to insure title. We would stick to the rule that it is only a recorded joint tenancy deed that overrides a previously recorded beneficiary deed.

Issues with respect to execution and revocation of a beneficiary deed by all joint tenants acting together are discussed in a subsequent memorandum in connection with the rights of multiple owners of property.

Community Property

Community property tenure presents some unique challenges. We will analyze ordinary community property separately from the new title form of community property with right of survivorship.

Community property. The spouses (as well as registered domestic partners) have an equal and undivided interest in community property, and equal rights of management and control. However, neither spouse may make a gift of community property without the consent of the other spouse, nor may either make a conveyance of community real property without the joinder of the other. That does not preclude a spouse from disposing of that spouse's 50% interest in community property by will or nonprobate transfer. See, e.g., *Estate of Miramontes-Najera*, 118 Cal. App. 4th 750, 13 Cal. Rptr. 3d 240 (2004). A spouse may make a nonprobate transfer of the entire community interest in a piece of property with the consent of the other spouse. Prob. Code §§ 5010-5032. Absent a disposition by will or nonprobate transfer, community property passes to the surviving spouse by right of survivorship.

How will these rules interact with a beneficiary deed? A likely scenario in many cases is that both spouses will join in a beneficiary deed of community

property to a child or other person. This type of transfer would be consistent with existing laws governing passage of community property. We would simply need to make sure that **the enabling statute is so drafted as to encompass a beneficiary deed by community property owners**. Whether this would create problems with respect to revocability after the death of the first spouse is discussed in more detail in a subsequent memorandum in connection with multiple ownership.

In theory, there should not be a problem with a spouse disposing of that spouse's 50% share in community property by beneficiary deed, just as the spouse may dispose of the spouse's 50% share by will. However, the community property statutes requiring the joinder or consent of the other spouse for a gift or conveyance of community property could come into play. Those statutes are intended to apply to a lifetime transfer, not a transfer that takes effect at death; but because the beneficiary deed must be recorded during lifetime, the statutes may be read to apply. The staff thinks **we need to make clear by statute that a beneficiary deed executed by one spouse acting alone may be effective to transfer that spouse's 50% interest in community property at death**.

Issues relating to the rights of an omitted spouse against property disposed of by beneficiary deed are discussed in a subsequent memorandum.

Community property with right of survivorship. CPWROS is a new form of title created in 2000. Unlike ordinary community property, by agreement of the spouses CPWROS may not be disposed of by will but "shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy." Civ. Code § 682.1. CPWROS is apparently effective without recordation. CPWROS title is revocable by either spouse acting alone, in which case the property reverts to ordinary community property subject to ordinary means of testamentary and nontestamentary disposition.

What would be the effect on CPWROS property of a beneficiary deed executed by one of the spouses in favor of a beneficiary other than the surviving spouse? The CPWROS statute indicates that termination of the right of survivorship may be accomplished pursuant to the same procedures by which a joint tenancy may be severed. Civ. Code § 682.1(a). If we conclude that recordation of a beneficiary deed severs a joint tenancy, then recordation of a beneficiary deed would also terminate the survivorship right in CPWROS

property. Probably no special legislation will be necessary to address this matter, although **we may wish to indicate this result in any commentary we prepare**.

Effectuation of Transfer

Unlike other nonprobate transfer mechanisms, the beneficiary deed employs no third party intermediary such as a financial institution, broker, or insurance company to transfer the property to the beneficiary after the decedent's death. The conveyance of title to the beneficiary is self-executing on the decedent's death.

As a practical matter more must be done to effectuate a beneficiary deed transfer. A beneficiary that seeks to encumber the property, or sell it, may encounter resistance absent some assurance that the decedent has in fact died, that the beneficiary deed was validly executed, that there are no other claims against the property, and the like. Because there is no probate proceeding, there is no definitive determination of these matters. The system must rely on the mechanism of title insurance to make it work efficiently as intended.

The situation is not much different from passage of property by right of survivorship pursuant to a joint tenancy or community property. That happens automatically by virtue of the nature of the property interest, with no intervention by an intermediary to effectuate the transfer.

In those circumstances, the standard technique is that the beneficiary records an affidavit of death together with a certified copy of the death certificate. The procedure is authorized by statute, and it is standard practice for a title insurer to act in reliance on it. Cf. Prob. Code §§ 210-212. This procedure applies equally well to passage of community property with right of survivorship; the statute specifically provides that the property passes to the survivor "subject to the same procedures, as property held in joint tenancy." Civ. Code § 682.1(a).

There is a twist in the case of community property with right of survivorship, or in the case of a joint tenancy between spouses. Under legislation enacted in 2001, the dissolution or annulment of the marriage operates as a severance of the joint tenancy or CPWROS. Prob. Code § 5601. As a result of this provision, a title insurer may want some assurance that the joint tenants were not married or, if they were, that the marriage was not dissolved before death. The law addresses the issue by providing for an affidavit of facts on which a third person may rely, and by protecting the rights of a bona fide purchaser or encumbrancer. Prob. Code §§ 5601(c), 5602.

The staff sees no reason why the same procedures applicable to joint tenancy or CPWROS could not be made applicable to effectuate a transfer of property that passes under a beneficiary deed. In fact, that appears to be the process used in jurisdictions that have enacted beneficiary deed legislation.

> The emerging consensus is to use something akin to the termination-of-joint-tenancy form used upon the death of a joint tenant. The form should be signed by the beneficiary stating that the sole or last surviving owner has died and that the beneficiary now accepts ownership of the property.

Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002).

We would make sure that any legislation is drafted in such a way as to **allow application of the existing affidavit procedures to a beneficiary deed**.

Failure to Effectuate Transfer

David Mandel is concerned about a circumstance where the beneficiary fails to act to effectuate the transfer. That could occur for a number of reasons. For example, the beneficiary may be unaware of the existence of the beneficiary deed, or perhaps the property contains hazardous waste and the beneficiary doesn't want the cleanup expense or liability exposure.

Should there be period of time during which the beneficiary must record an affidavit and effectuate the transfer, otherwise the decedent's testate or intestate beneficiaries would take the property? Mr. Mandel suggests that we could impose a duty on the beneficiary to record within a reasonable time after the decedent's death — say one year — after which the right of the beneficiary would lapse.

> This puts the onus on the grantor to inform one or more beneficiaries of the intended gift, and on the beneficiary to remain cognizant of the grantor's life. Though this could create an unintended and possibly messy result in rare instances, I don't believe it would occur any more frequently than the inability to find a successor trustee (and any alternates) after the death of the trustor of an inter vivos trust.

Mr. Mandel points out that similar situations occur with other types of probate and nonprobate procedures — a trust document gets lost (or the trust isn't funded), the decedent makes a transaction affecting property that is contrary to the decedent's estate plan, etc. "Sooner or later the messes are sorted

out according to law and equities. The goal in new legislation of this sort should be to minimize their creation."

The staff thinks this is an interesting idea. As a practical matter, however, we would guess that in most cases the intestate taker will be the same as the beneficiary. The net effect of the beneficiary's failure to timely effectuate the transfer would be to force the property through probate, without any real benefit in the end. We wonder whether the problem envisioned by Mr. Mandel is sufficiently great to warrant disturbing the decedent's estate plan to address it.

Mr. Mandel also suggests that one way to minimize this sort of problem would be to require that the county recorder notify the beneficiary when a beneficiary deed is recorded, or when a superseding document is recorded. While this is also an interesting suggestion, the staff would not pursue it. Our work in other areas suggests that county recorders will resist imposition of such a duty, even if accompanied by an appropriate fee. Moreover, we would be reluctant to make a public duty out of something that could and should easily be done by the person that records the beneficiary deed or superseding instrument.

Contest

Grounds

Because the beneficiary deed operates outside the probate system, there is no opportunity for other claimants to the property to contest the transfer before an affidavit of death is recorded and the property is perhaps transferred to a bona fide purchaser. The objective of standard nonprobate transfer practice is to make the transfer of property itself quick, simple, and efficient. If there are contrary claims, those are sorted out later, but that does not ordinarily interfere with the effort to effectuate the transaction.

The general principles are stated in California's nonprobate transfer law:

> 5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors, and whether or not the transfer is consistent with the rights of the person named as beneficiary.
>
> (b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the

property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.

Prob. Code § 5003.

What are grounds on which a disappointed heir might wish to challenge a transfer pursuant to a beneficiary deed? Likely grounds are the alleged fraud, duress, or undue influence of the named beneficiary. Such allegations would likely not be uncommon in the beneficiary deed situation, where the device might be used by an elderly decedent to pass property to a child. Other allegations undoubtedly would go to lack of capacity of the decedent, and to defects in execution of the beneficiary deed.

Under standard nonprobate transfer practice, the disappointed heir's remedy would be against the beneficiary, not against the property. Of course the beneficiary may have dissipated the proceeds and be judgment proof, but that is a price we pay for the efficiency of the nonprobate transfer system. If the property had passed through probate, there would have been notice to adverse claimants and an opportunity to test the transfer before it was effectuated.

Proceedings

The general rules effectuating an at death transfer and limiting the liability of a third party are designed for the situation where a third party stakeholder

makes the transfer — a bank pays out in accordance with the terms of a pay on death beneficiary designation, a brokerage transfers securities in accordance with a transfer on death designation, etc. The situation is somewhat different in the case of real property, where the deed is self-executing and the property is not portable. The closest analogue to a third party transfer agent in this situation is a title company that issues title insurance on the beneficiary's interest.

The jurisdictions that have enacted beneficiary deed legislation appear generally not to address these issues, evidently leaving the logistics to general law of some sort. The Colorado statute does specify the applicable statute of limitations — the right of an heir, devisee, or personal representative to recover property or its value from the beneficiary is barred three years after the owner's death, or one year after recordation of a certificate of death, except in the case of fraud. Colo. Rev. Stat. § 15-15-411. Missouri provides somewhat more guidance. Fraud, duress, or undue influence void a beneficiary designation and may be judicially determined on petition of an interested person in a proceeding in which a jury trial is available and in which the relief awarded may be mitigated as the trier of fact determines that justice requires. Mo. Rev. Stat. § 461.054. Any property wrongfully received by the beneficiary, or its value, is subject to restitution. Mo. Rev. Stat. § 461.067.

The core procedural issues confronting us are the grounds for a contest, nature of the proceeding, venue, pleadings, statute of limitations, and remedies. The staff suggests that we look to the existing California statutes for guidance on these matters. Existing statutes already govern passage of property, including real property, to a beneficiary without probate in the case of a small estate. The statutes are found at Probate Code Section 13000 et seq., and are not unlike the rules developed in Colorado and Missouri.

The California statutes typically validate the beneficiary's actions in collecting and disposing of the decedent's property without probate administration. Ordinarily, however, they require that the beneficiary wait 40 days before acting. See, e.g., Prob. Code §§ 13100 (collection or transfer of personal property), 13151 (petition for court order determining succession to property), 13540 (right of surviving spouse to dispose of property). But see Prob. Code §§ 13200 (six months required before affidavit for real property of small value), 13600 (salary of deceased spouse may be collected immediately). A beneficiary that collects property without administration is personally liable to a person having a superior right to the property. Prob. Code §§ 13110 (personal property), 31205

(real property), 13561 (spousal property), 13605 (spousal salary). Alternatively, a probate proceeding may be commenced and restitution of the property to the estate required. Prob. Code §§ 13111, 13206, 13562. A typical statute of limitations for imposition of liability on the beneficiary in these proceedings is three years. See, e.g., Prob. Code § 13110-13111 (personal property), 13205-13206 (real property), 13561-13562 (spousal property).

The staff is loath to reinvent a contest procedure specially for the beneficiary deed. Instead, **the staff suggests that we consider adapting or incorporating by reference one of the existing California small estate procedures**. Those procedures are designed to handle analogous circumstances where property passes to a beneficiary outside of probate. They are well articulated and have been in operation for many years, apparently free of problems. They are familiar to courts and practitioners.

In fact, the California Judges Association opposition to AB 12 suggests that, instead of creating a beneficiary deed for transfer of real property without probate, the Legislature might simply consider raising the monetary limits for transfer of property by affidavit and for petitions to succeed to real property. That is something the Legislature currently has under review. See discussion of "Small Estate Proceedings" above.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

John J. Zaleski
3332 Bahia Blanca East, Unit B
Laguna Woods, CA 92637
Home Phone (949) 460-9022

November 14, 2005

CA Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94303-4739

Dear Commissioners,

I urge you to approve AB12 Beneficiary Deeds allowing homeowners to deed their property directly to their heirs without the expense of a trust or of a probate and pass it on to the Legislature for approval.

In these times, after a prolonged or expensive illness, sometimes the only monetary legacy the demised can leave to their preferred heirs is the property they hold. The cost of setting up a trust or having a probate diminishes from this intent.

Respectfully yours,

John J. Zaleski

John J. Zaleski

Senior Legal
Services Project

San Luis Obispo
Legal Alternatives
Corporation

November 21, 2005

California Law Revision Commission
4000 Middlefield Road, #D-1
Palo Alto CA 94303-4739

RE: AB 12: to study feasibility of beneficiary deeds to convey real property through non probate transfers

This letter is written to urge your Commission to support revising California law to permit a non probate transfer of real estate through the use of a beneficiary deed.

I work with seniors as part of the legal services provided through the national Older American Act. In my practice on a weekly basis, I see dozens of older people, usually widows, who own the home they live in and otherwise have no assets. They live on Social Security benefits. They want to ensure that the home will pass to their children, but do not want the children to bear the expense of a costly probate proceeding in order to transfer title to that home after the elder's death. It is not time or cost effective to prepare Trust documents for them in order to protect their home from probate and still carry out their distribution wishes. It is often not wise legally or financially to add those children to the title during their lifetimes.

Please consider the plight of the thousands of elderly people in California who do not have either resources to pay private attorneys to create complicated estate plans for them now, nor the resources in their estate to finance a probate proceeding at their death. Often the home must be sold to satisfy legal costs, thus thwarting the desires of the elder to leave her family home to her children.

The use of a beneficiary deed would solve this dilemma. It would permit after death transfer of the home to named beneficiaries without probate proceedings and without the current cost to create a Trust. I hope your studies over the next year will bring you to the same conclusion.

Very truly yours,

ANGIE KING
Project Director

PO Box 14642
San Luis Obispo
California 93406
(805) 543-5140

Area Agency on Aging

November 24, 2005

Dear Sirs:

Please help us prevent the courts & lawyers from undo profits when we transfer ownership of our small homes to our heirs.

The use of a beneficiary deed would by pass probate process.

I taught school for for ty years; never made over $20,000 a year. My small "manor" I would like to leave to my family without a huge expense.

Thank you

Ruth Rehm
2176 Via Puerta #5
Laguna Woods CA 92637

5334 B Bahia Blanca
Laguna Woods, Ca. 92637

November 24, 2005

Ca. Law Revision Commission
Palo Alto, Ca

Gentlemen:

The present fee for transferring personal residence to heirs via probate are excessive

May I respectfully recommend the legislature change the current law.

I would ask you to support Beneficiary Deed Legislation so that this law be changed

Thank you.

Very truly yours,
Leonard B. Goldman
LEONARD B GOLDMAN

Nov. 25, 2005
9 Via Castilla "A"
Laguna Woods, 92637

Calif. Law Revision Commission
4000 Middlefield Rd.
Palo Alto, CA 94303

Gentlemen:

I hereby fully support the proposed legislation to authorize the use of a "beneficiary deed" to bypass probate and transfer ownership directly to my designated heirs. Your support of this bill (AB12) would be beneficial to all seniors and very much appreciated.

Very truly yours,
Amanda Schroeder

Patricia H Drake
Laguna Woods Village
2074-A Ronda Granada
Laguna Woods, CA 92637

November 26, 2005

File:_____

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, California 94303-4739

Re: AB12

Dear Commission Chair,

I support the subject bill for beneficiary deed legislation so that the children of property owners will not have to probate their parents' personal residence. This bill will allow a personal residence to bypass the public probate process and enable the transfer of ownership directly to the heirs. This will not only save the children money in court costs but the time it takes for probate (an average of two years) before they can sell the property should they wish to do so.

Please pass this important, urgently needed and long overdue bill.

Thank you very much,

Patricia H Drake

Patricia H. Drake

11-27-05

I am writing in support of the "beneficiary deed" legislation which would by pass the public probate process and enable the transfer of ownership directly to designated heirs.

Barbara Goldberg
3288 San Amadeo Unit A
Laguna Woods CA 92637

MICHAEL J RYAN 605 AVENIDA SEVILLA UNIT A
LAGUNA WOODS CA 92637-7101

November 27, 2005

California Law Revision Commission

4000 Middlefield Road room D-1

Palo Alto CA 94303-4739

I would like to urge the commission to recommend that the California Legislature support a Revocable Transfer-on - Death Beneficiary Deed Bill.

Sincerely,

Michael J Ryan

Mr. Louis M. Sirkis
3286 San Amadeo Unit B.
Laguna Woods, CA 92637

November 27, 2005

California Law Revision Commission
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Gentlemen:

As a home owning citizen with no living Trust, I am writting you in support of "AB 12 Beneficiary Deed"

The Transfer on Death Deed will greatly benefit me and a tremendous number of similarly situated Californians

I urge you to give this bill your favorable consideration.

Sincerely,
Louis M Sirkis

11-28-05

Dear Barb:

Shari is to support the beneficiary deed legislation AB 17.

I will in a senior community and would like to transfer my property to my heirs directly without probate fees.

Ann Nielstrom/ahielstrom@pea.net

A personal note...

from 

Ms. Joan I. Davis
695 Avenida Sevilla Unit A.
Laguna Woods, CA 92637

To: California Law Revision Commission,

Please support the Beneficiary Deed Legislation "AB 12" allowing the transfer of my property to my heirs without attorneys + courts!!

Thank you,

Joan I. Davis

Ms. Betty Laskey
3420 Calle Azul Unit 3D
Laguna Woods, CA 92637-2873

12/1/05

California Law Revision Commission
4000 Middlefield Road - Room D-1
Palo Alto, CA 94303-4739

Gentlemen.

I am writing to ask you to please enable us to deed our homes to our heirs when we die without imposing extra fees. We should be able to use a "beneficiary deed" which would bypass the probate courts.

Thank you for helping seniors to feel that our children will not be unduly burdened when we die

Sincerely yours

Betty Laskey

File:_____

I want to express my support
for Beneficiary Deed Legislation

Thank you

Ellen Wiseman
877 N Avenida Sevilla
Laguna Woods, Ca
92637

Dear Sir,

I would like to give my support for the — "beneficiary deed legislation"

Sincerely

Violet VanKanten

REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

This Petition will be mailed to the CALIFORNIA LAW REVISION COMMISSION, 4000 Midlefield Road, Room D-1, Palo Alto, CA 94303-4739.

Signers of this Petition request that the Commission recommend to the California Legislature the enactment of a new law that would allow Californians to transfer real estate to a benficiary on the death of the property owner without probate. Several states have such a non-probate real estate transfer law.

This REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED would allow the homeowner to avoid the expenses of Probate, a Trust, and Capital Gains Taxes.

The first name is to be used as an example.

	NAME:	ADDRESS
1.	Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA 92637
2.	Dorothy FREDERICKS	776 Via Los Altos Unit G Laguna Woods 92637
3.	mary Rose WAKEN Mary Rose Waken	533-G Via Estrella LW 92637
4.	Barbara M. Anderson Barbara McAnderson	2313 B Via Puerta Laguna Woods
5.	Patricia A. Bailey Patricia A. Bailey	4922 Via Mendoza
6.		, 92637
7.	Gail Shapero Gail Shapero	5559-A Via Portona, Laguna Woods, 92637
8.	Dennis Maynard Dennis Maynard	5559A Via Portona Laguna Woods 926
9.	ROBERT & LUCY Robert & Lucy	2465 Paseo del Lago Laguna Woods CA.
10.	Phyllis Beaucaire PHYLLIS BEAUCAIRE	2465 Paseo del Lago #5G Lag Woods

OLDMAN, COOLEY, SALLUS, GOLD, BIRNBERG & COLEMAN LLP

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SUSAN J. COOLEY
MARC L. SALLUS
RONALD GOLD
JAMES R. BIRNBERG
DAVID COLEMAN
SUSAN R. IZENSTARK
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MARY-FELICIA APANIUS
JUSTIN B. GOLD

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ENCINO, CALIFORNIA 91436-2447
TELEPHONE (818) 986-8080 • FAX (818) 789-0947
E-MAIL info@oclslaw.com

WALTER M. LEIGHTON
(1942-2004)

December 8, 2005

jbirnberg@oclslaw.com

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Attn: Nathaniel Sterling, Executive Secretary

Re: **AB 12 (DeVore); 2005 Cal. Stat. ch. 422**
Study L-3032; Memorandum 2005-46

Dear Nat :

I have looked at Memorandum 2005-46 and the November 18, 2005 Supplement. Without taking sides on the questions to be decided by the Commission, I think it would be useful for the it to have available the arguments that were presented to the Conference of Delegates at the 2005 meeting. I am enclosing the final version of Resolution 05-05-05, which covers the same subject matter as the bill introduced by Assembly Member De Vore and which was proffered by the proponent of the DeVore bill.

What seems to be missing in the discussion–thus far– is the fact that revocable deeds have been recognized and used in California for the past century. See, **Tennant v. John Tennant Memorial Home**, 167 Cal. 570, 140 Pac. 242 (1914); also see, **Bonta v. Burke**, 98 Cal.App4th 788, 120 Cal. Rptr.2d 72 (2002; Medi-Cal case, transfer was by revocable deed). I am not sure whether the letters from lay people in support of DeVore's bill would wish a statute enacted if they knew about the California case authority for revocable deeds. Actually, I am not sure that most lawyers are aware of that case law either.

Very truly yours,

JAMES R. BIRNBERG

JRB:jrb
Enclosure

S:\James\Cal Law Rev Cssn Letters\Ltr CLRC re DeVore Bill.12.08.05 wpd

RESOLUTION 05-05-05

DIGEST
Probate: Transfer of Real Property on Death
Adds Probate Code section 5800 to allow the transfer of real estate without a court proceeding.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 09-03-04, which was withdrawn.

Reasons:
This resolution adds Probate Code section 5800 to allow the transfer of real property without a court proceeding. This resolution should be disapproved because it creates and encourages estate planning substitutes that are more likely to increase elder abuse and real property title problems.

The proponent resubmits the resolution from last year, but adds the requirement for two witnesses or a certificate of review by an attorney to be included on the beneficiary deed. The current resolution fails to address abuses and chain of title problems that are likely to be created with this type of deed. The use of witnesses does not reduce the likelihood of undue influence. In the event a property owner executes multiple beneficiary deeds at different times, the true intent of the property owner may not be followed if the deeds are not recorded in the order in which they were signed. Further, there are valid reasons the law provides for heirs at law and creditors to receive notice upon the death of a person in probates and trust administrations. The beneficiary deed does not allow heirs at law or creditors to know real property has passed to named designees upon the death of a family member, and as a result the property may be sold or refinanced before possible abuse claims can be raised.

Assembly Bill No. 12 is similar to the proponent's resolution, but it contains protection for creditors. The bill has been sent to the California Law Revision Commission for study.

SECTION/COMMITTEE REPORTS

TRUSTS & ESTATES COMMITTEE RECOMMENDATION
DISAPPROVE

Revocable deeds with reserved life estates are valid in California based on *Tennant v. John Tennant Memorial Home* and have been used with the advice of counsel in the past where the cases are simple ones which do not involve alternate or multiple takers. The proposed legislation is neither necessary nor appropriate, since it would add yet another area of self-help estate planning in a situation where the inherent inflexibility of the planning method is ignored. The potential for fraud and confusion by the creation of such deeds is significant. If revocable deeds with reserved life estates are to be used at all, it is best that they be used with competent legal advice as they are under current case law.

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Probate Code section 5800 to read as follows:

§ 5800

(a) A deed that conveys an interest in real property, including any debt secured by a lien on real property to a grantee beneficiary designated by the owner and that expressly states that the Deed is effective on the death of the owner transfers the interest to the designated grantee beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts, mortgages, deeds of trust, liens. security pledges and other encumbrances made by the owner or to which the owner was subject during the owner's lifetime.

(b) A beneficiary deed may designate multiple grantees who take title as joint tenants with right of survivorship, tenants in common, a husband and wife as community property with right of survivorship, or any other tenancy that is valid under the laws of this state.

(c) A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.

(d) If real property is owned as joint tenants with right of survivorship or as community property with the right of survivorship, a deed that conveys an interest in the real property to a grantee beneficiary designated by all of the then surviving owners and that expressly states that the deed is effective on the death of the last surviving owner transfers the interest to the designated grantee beneficiary effective on the death of the last surviving owner. If a beneficiary deed is executed by fewer than all of the owners of real property owned as joint tenants with right of survivorship or community property with right of survivorship the beneficiary deed is valid if the last surviving owner is one of the persons who executes the beneficiary deed. If the last surviving owner did not execute the beneficiary deed, the transfer shall lapse and the deed is void. An estate in joint tenancy with right of survivorship or community property with right of survivorship is not affected by the execution of a beneficiary deed that is executed by fewer than all of the owners of the real property and the rights of a surviving joint tenant with right of survivorship or a surviving spouse in community property with right of survivorship shall prevail over a grantee beneficiary named in a beneficiary deed.

(e) A beneficiary deed is valid only if the deed is executed and recorded as provided by law in the office of the county recorder of the county in which the property is located before the death of the owner or the last surviving owner. A beneficiary deed may be used to transfer an interest in real property to the trustee of a trust even if the trust is revocable.

(f) A beneficiary deed may be revoked at any time by the owner or, if there is more than one owner, by any of the owners who executed the beneficiary deed. To be effective, the revocation must be executed and recorded as provided by law in the office of the county recorder of the county in which the real property is located before the death of the owner who executes the revocation. If the real property, is owned as joint tenants with right of survivorship or community property with right of survivorship and if the revocation is not executed by all the owners the revocation is not effective unless executed by the last surviving owner.

(g) If an owner executes and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner's death is the effective beneficiary deed.

(h) This Section does not prohibit other methods of conveying property that are permitted by law and have the effect of postponing enjoyment of an interest in real property until the death of the owner. This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.

(i) The signature, consent or agreement of or notice to a grantee beneficiary of a beneficiary deed is not required for any purpose during the lifetime of the owner.

(j) A beneficiary deed that is executed, acknowledged and recorded in accordance with this section is not revoked by the provisions of a will.

(k) A beneficiary deed is sufficient if it complies with other applicable laws and if it is in substantially the following form:

Beneficiary Deed

I (we) _____ (owner) hereby convey to _____ (Grantee Beneficiary) effective on my (our) death the following described real property:

[legal description]

_____

Signature of Grantor(s)

(Acknowledgment)

(1) The instrument of revocation shall be sufficient if it complies with other applicable laws and is in substantially the following form:

Revocation of Beneficiary Deed

The undersigned hereby revokes the beneficiary deed recorded on _____ in document or book number _____ at page _____, or instrument no, _____ records of _____ County, California.

Dated:

_____

Signature

(Acknowledgment)

(m) For the purposes of this section:

1. "Beneficiary Deed" means a deed authorized under this section.

2. "Owner" means any person who executes a beneficiary deed as provided in this section.

(n) There shall be an attestation provision as hereinafter stated in (1) below executed by at least two disinterested witnesses at the time of execution by the Owner or an Attorney's Certificate of Independent Review as hereinafter stated in (2) below:

(1) (Notice to Witnesses: Two (2) adults must sign as witnesses. Each witness must read the following provision before signing. The witnesses should not receive any interest from the Beneficiary Deed. Each of us declares under penalty of perjury under the laws of the State of California that the following is true and correct:

(A) On the date written below the maker of this Beneficiary Deed declared to us that this instrument was the Owner's Beneficiary Deed and requested us to act as witnesses to it;

(B) We understand this is the Owner's Beneficiary Deed;

(C) The Owner signed this Beneficiary Deed in our presence, all of us being present at the same time;

(D) We now, at the Owner's request, and in the Owner's and each other's presence, sign below as witnesses;

(E) We believe the Owner is of sound mind and memory;

(F) We believe that this Beneficiary Deed was not pressured by duress, menace fraud or undue influence; and

(G) Each of us is now 18 or older, is a competent witness, and resides at the address set forth after his or her name.

Dated:

_____	_____
Signature	Signature
Print name here:	Print name here:
_____	_____
Residence Address:	Residence Address:
_____	_____

AT LEAST TWO WITNESSES MUST SIGN
NOTARIZATION ALONE IS NOT SUFFICIENT

(2) CERTIFICATE OF INDEPENDENT REVIEW

I, _____ (attorney's name), have reviewed the Beneficiary Deed and counseled my client, _____ (name of client), on the nature and consequences of the transfer, or transfers, of property to _____ (name of transferee(s)) contained in the Beneficiary Deed. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the Beneficiary Deed are valid because the transfer is not the product of fraud menace. duress or undue influence.

_____	_____
Name of Attorney	Date

(o) For the Beneficiary Deed to be effective to transfer title on death, the Beneficiary Deed must be recorded in the County in which the real property is located within thirty (30) days of execution by the Owner.

(p) For the revocation o the Beneficiary Deed to be effective, it must be recorded in the County in which the real property is located prior to the death of the Owner.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: There is no present code section or provision providing a transfer on death for real estate like a savings account or like a "pod" account for securities.

This Resolution: Allows an individual to transfer real estate in the same manner as transfer on death ("tod") accounts and paid on death ("pod") accounts.

The Problem: Some individuals want to transfer real estate at death other than by joint tenancy or to create a trust. This new law is from an Arizona statute.

IMPACT STATEMENT

This resolution does not affect any other laws.

CO-AUTHORS AND/OR PERMANENT CONTACTS: Edward H. Stone and Mary Pat Toups, 18201 Von Karman Avenue, Suite 1160, Irvine, CA 92612-1005, voice 949-833-7708, fax 949-833-7583, e-mail none.

RESPONSIBLE FLOOR DELEGATE: Edward H. Stone

COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution fails to address the issue of a conflicting provision in a will. In addition, it is likely to create additional issues. For instance, could a beneficiary obtain a loan on this entitlement? It might also increase costs to obtain title insurance.

SACRAMENTO COUNTY BAR ASSOCIATION

This proposed resolution would create an overly complicated, duplicative method of disposing of real property at a person's death. In many ways it mirrors a probate proceeding with a will but provides none of the protections that go along with probate and a will. It would allow a person's real property to pass without payment of the person's creditors. It would create more opportunities than presently exist for non-lawyers to give inadequate or poor advice to persons wishing to avoid probate, and more opportunities for abusers to obtain title to property from the elderly, without the court overseeing the transfer. Title companies would object to it, on the grounds that it creates a revocable deed process, and the consequent greater difficulty of determining the state of title when title insurance is in issue. Assembly Bill No. 12 is currently active in the Assembly, with provisions similar to this proposed resolution, but containing protection for creditors. Delegates should vote "disapprove" or "action unnecessary" on this resolution.

12-9-05

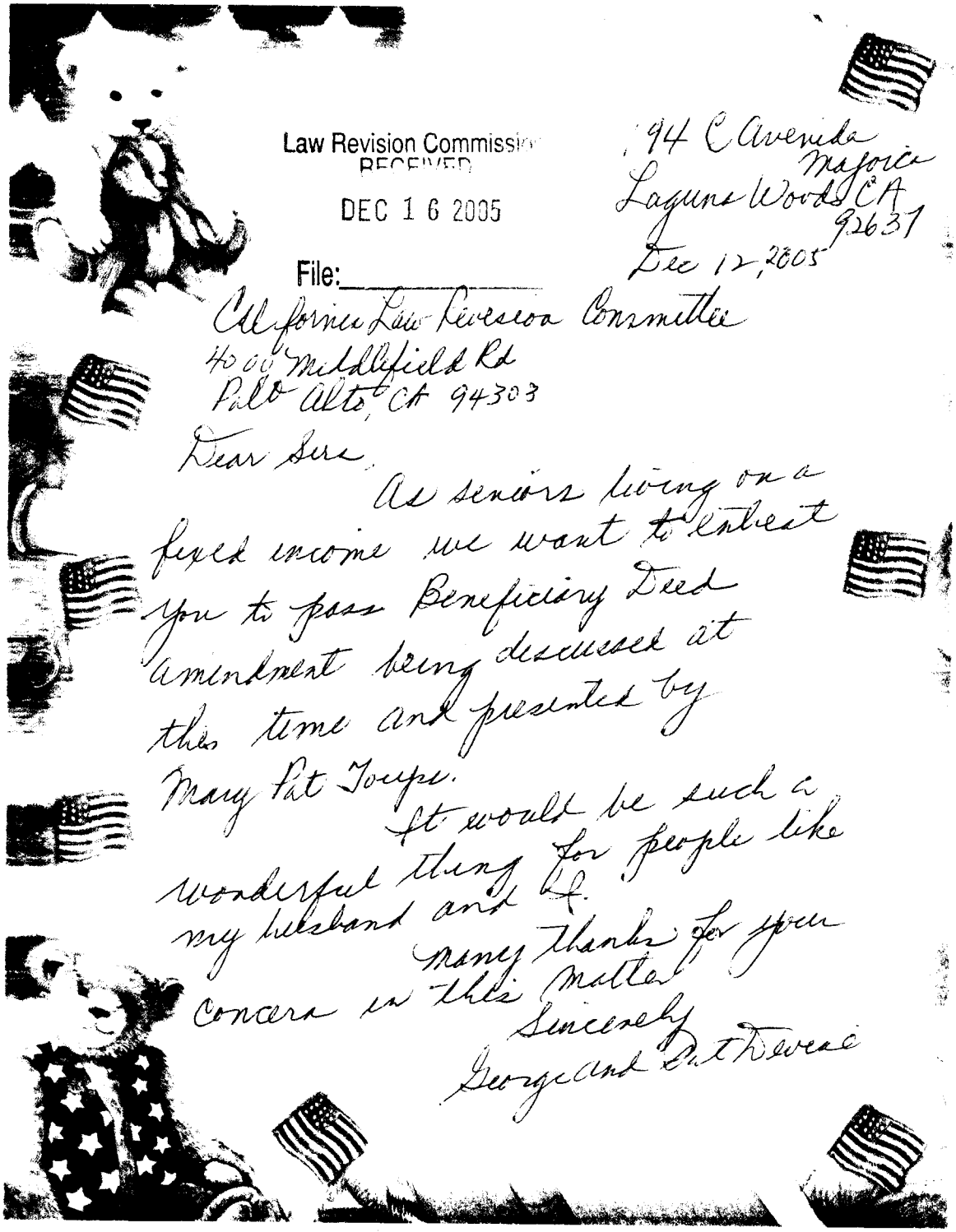
California Law Revision Commission
4000 Middlefield Road
Room D 1
Palo Alto, Ca. 94303-4739

Gentlemen,

I am writing to voice my opinion regarding Mary Pat Toupes desire to get a law passed that would enable Myself and others to use a "Beneficiary Deed".
There is nothing in my Estate excepting my Home that would need probating.
It will make a simple situation into a Problem.
Please vote yes to this Change.

Sincerely,

Betty K. Lyles
308 Nue. Castilla, Unit B
Laguna Woods, Ca. 92637



Law Revision Commission
RECEIVED
DEC 16 2005
File:

94 C Avenida Majorca
Laguna Woods CA 92637
Dec 12, 2005

California Law Revision Commission
4000 Middlefield Rd
Palo Alto, CA 94303

Dear Sirs,

As seniors living on a fixed income we want to request you to pass Beneficiary Deed amendment being discussed at this time and presented by Mary Pat Toupe.

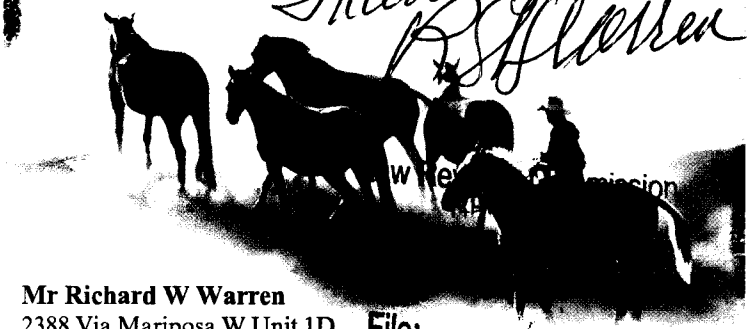
It would be such a wonderful thing for people like my husband and I.

Many thanks for your concern in this matter.

Sincerely
George and Pat Reveal

12-19-05

Gentlemen -
I support the
efforts to pass AB12
authorizing the use
of a "beneficiary
deed". Please
urge the legislature
to see this through.
Thank you.
Richard Warren



Mr Richard W Warren
2388 Via Mariposa W Unit 1D
Laguna Woods CA 92653

File:

COMMENTS OF JOHN A. CAPE

Date: December 20, 2005
To: California Law Revision Commission
Subject: AB-12 and the proposal for creating a Beneficiary Deed statute in California

This is to express my support for drafting legislation that would establish a simple beneficiary deed process in California for passing real property interests to designated beneficiaries on the death of the owner.

I have been providing volunteer pro bono legal services in Northern California for nearly fifteen years. One of the most frequent problems of seniors is the need for a simple way to pass property on their death to the persons they designate. That is very easy for liquid assets such as savings accounts and securities where Payable on Death (POD) and Transfer on Death (TOD) designations are available.

Currently with POD and TOD designations a person can pass on unlimited savings and securities yet only $20,000 worth of real property can be transferred under Probate Code 13200 and even that process is too complex for most to deal with without the services of an attorney. What sense is there in a system that would let me transfer $20,000,000 worth of savings and securities to my heirs without probate or a trust yet I could only transfer $20,000 worth of real property outside probate or without a trust?

Is there any parcel of real property in California that is worth less than $20,000 at today's prices?

Many senior citizens have little in liquid assets and most of their estate is in their residence. When they find out that they have to incur the expense and administrative burdens of a revocable trust, or subject their heirs to the cost and delays of probate they sometimes try to use other devices to pass on their property. One of the most frequent is to retitle their property in joint tenancy with the heirs. That is very risky since they subject the property to liabilities incurred by the joint tenants. Often they execute an undated quitclaim deed that is not recorded with the hope that it can be used to transfer the property after their death. In other situations they deed the property to the heirs and reserve a life estate. That creates complications because the transfer is not revocable. In addition it is difficult to deal with that situation when the life tenant is no longer capable of living on the property. Such devices also trigger elder abuse concerns when the relationship between the parties becomes strained.

When I am asked by the pro bono clients why their neighbors can transfer millions of dollars of cash and securities without a trust or probate, but they cannot transfer a small $30,000 undeveloped parcel how should I respond? "That it makes no sense?" "That the current system is just there to provide a stream of income to the probate and trust providers and the probate referees?" The current rules have erected a roadblock at the Recorder's Office that provides no benefit to a property owner. Is there any significant difference between passing a real property interest and an interest in securities to one's heirs? Why should there be a time consuming and expensive process for realty yet securities of any value can pass with a simple beneficiary designation?

It is long past time for California to adopt a revocable beneficiary deed in a format similar to that of the statutory will so that property owners will have a simple way to pass real property to their heirs in a manner consistent with the POD and TOD process available for savings and securities.

Thank you for your efforts.

As you proceed with this study I hope that simplifying the processes and reducing the burden on property owners and their heirs will be the primary objectives of the CLRC.

John A. Cape
Attorney
19890 Venus Ct.
Grass Valley, CA 95949
530.346.2705

COMMENTS OF RICHARD HICKS

From: rhicks2@cox.net
Subject: Revocable Transfer on Death Beneficiary Statute
Date: January 21, 2006
To: sterling@clrc.ca.gov

Dear Mr. Sterling,

As a retired state bar Emeritus attorney and senior citizen, I would like to add my name to those who have urged the Law Revision Commission to draft a Revocable Transfer-on-Death Beneficiary Statute for the state of California.

The trust lawyers who oppose this need not worry. There are plenty of Californians who will continue to want their services for the more traditional will and trust, because those instruments deal with much more than the transfer of property.

But for many senior citizens with limited incomes, hiring a trust attorney is not a possibility. A law similar to that adopted by other states makes sense for our senior citizens.

Thank you for you consideration.

Sincerely,

Richard Hicks
2058 Cambridge Ave.
Cardiff, CA 92007
(760)632-1916
rhicks2@cox.net

State Bar #34131

COMMENTS OF GERALD RICHARDS

From: gerald.richards@gmail.com
Subject: TRANSFER-ON-DEATH BENEFICIARY DEEDS
Date: January 21, 2006
To: sterling@clrc.ca.gov

Mr. Sterling,

I write to urge the Commission to support the idea embodied in AB12 to have California adopt the Transfer-on-death Beneficiary Deed. I have been counseling senior clients (free of charge) for the past 10 years, 2 years in Northern San Diego County and the past 8 years here in Contra Costa County. I encounter very many senior clients (60 and older) who bought their homes in this area of high real estate prices when the price of such homes was under $100,000, some as little as $25,000. These houses are selling for anywhere from $450,000 to $1,000,000 now and the owners are living on a small Social Security pension. There is no way they can afford to hire an attorney to draft a trust document and help them transfer ownership of the home to the trust and some of them who might scrape the money together are afraid to see an attorney, strange as that seems to those of us who practice law. I am a member in good standing in the State Bar of California, a participant in the Emeritus Attorney Program and a member of the Probate, Trusts and Estates Section of the State Bar. I speak from my own experience with California Seniors when I say the Trust and Estate Planning attorneys are quite wrong when they say these people can afford and attorney if they have home valued at more that $100,000 (the Probate Court threshold). They will not lose any paying clients by this and there will be a lot of California Seniors who will rest much easier. I urge you to bring my comments to the attention of the Commission.

GERALD T. RICHARDS
EMERITUS ATTORNEY
CONTRA COSTA SENIOR LEGAL SERVICES
HERCULES, CA

COMMENTS OF DONNA AMBROGI

From: dlambrogi@verizon.net
Subject: <no subject>
Date: January 27, 2006
To: sterling@clrc.ca.gov

Please draft a Revocable Transfer-on-Death Beneficiary Statute for the state of California, to help implement AB 12. Seniors need this help!

Thank you for your help on this.

Donna Ambrogi
Emeritus Attorney pro Bono
737 Alden Rd., Claremont, CA 91711